# IN THE SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM
## No. 76-930

DIXY LEE RAY, Governor of the State of Washington; SLADE GORTON, Attorney General of the State of Washington; JOHN C. HEWITT, Chairman, and HARRY A. GREENWOOD, BENJAMIN W. JOYCE, PHILIP H. LUTHER, and J.Q. PAULL, Members, Board of Pilotage Commissioners; DAVID S. McEACHRAN, Whatcom County Prosecuting Attorney; CHRISTOPHER T. BAYLEY, King County Prosecuting Attorney; COALITION AGAINST OIL POLLUTION; NATIONAL WILDLIFE FEDERATION; SIERRA CLUB; and ENVIRONMENTAL DEFENSE FUND, INC.,

*Appellants,*

v.

ATLANTIC RICHFIELD COMPANY, and SEATRAIN LINES, INC.,

*Appellees.*

## BRIEF OF APPELLANTS

SLADE GORTON,
*Attorney General, State of Washington*
CHARLES B. ROE, JR.,
*Senior Asstistant Attorney General*
ROBERT E. MACK,
RICHARD L. KIRKBY,
*Assistant Attorneys General*
DAVID E. ENGDAHL,
*Special Assistant Attorney General*
Temple of Justice
Olympia, Washington 98504
(206) 753-2354
Attorneys for Appellants
Dixy Lee Ray, Slade Gorton, John C. Hewitt, Harry A. Greenwood, Benjamin W. Joyce, Philip H. Luther and J. Q. Paull

DAVID S. McEACHRAN,
*Whatcom County Prosecuting Attorney*
Whatcom County Prosecuting Attorney's Office
311 Grand Avenue
Bellingham, Washington 98225
(206) 676-6784
Attorney for Appellant
David S. McEachran

CHRISTOPHER T. BAYLEY,
*King County Prosecuting Attorney*
THOMAS A. GOELTZ,
JOHN E. KEEGAN,
ROBERT D. JOHNS,
*Deputy Prosecuting Attorneys*
King County Prosecuting Attorney's Office
King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 344-7398
Attorneys for Appellant
Christopher T. Bayley

ELDON V. C. GREENBERG,
RICHARD A. FRANK,
Center for Law and Social Policy
1751 N Street, N.W.
Washington, D.C. 20036
(202) 872-0670
THOMAS H. S. BRUCKER,
Durning, Smith & Brucker
1411 Fourth Avenue
Seattle, Washington 98101
(206) 624-8901
Attorneys for Appellants
Coalition Against Oil Pollution
National Wildlife Federation,
Sierra Club, and Environmental
Defenses Fund, Inc.

STATE PRINTING PLANT OLYMPIA, WASHINGTON

IN THE

# SUPREME COURT

OF THE

## UNITED STATES

OCTOBER TERM
No. 76-930

DIXY LEE RAY, Governor of the State of Washington; SLADE GORTON, Attorney General of the State of Washington; JOHN C. HEWITT, Chairman, and HARRY A. GREENWOOD, BENJAMIN W. JOYCE, PHILIP H. LUTHER, and J.Q. PAULL, Members, Board of Pilotage Commissioners; DAVID S. MCEACHRAN, Whatcom County Prosecuting Attorney; CHRISTOPHER T. BAYLEY, King County Prosecuting Attorney; COALITION AGAINST OIL POLLUTION; NATIONAL WILDLIFE FEDERATION; SIERRA CLUB; and ENVIRONMENTAL DEFENSE FUND, INC.,

*Appellants,*

v.

ATLANTIC RICHFIELD COMPANY, and SEATRAIN LINES, INC.,

*Appellees.*

## BRIEF OF APPELLANTS


SLADE GORTON,
*Attorney General, State of Washington*
CHARLES B. ROE, JR.,
*Senior Asstistant Attorney General*
ROBERT E. MACK,
RICHARD L. KIRKBY,
*Assistant Attorneys General*
DAVID E. ENGDAHL,
*Special Assistant Attorney General*
Temple of Justice
Olympia, Washington 98504
(206) 753-2354
Attorneys for Appellants
Dixy Lee Ray, Slade Gorton,
John C. Hewitt, Harry A.
Greenwood, Benjamin W. Joyce,
Philip H. Luther and J. Q. Paull

DAVID S. MCEACHRAN,
*Whatcom County Prosecuting Attorney*
Whatcom County Prosecuting
Attorney's Office
311 Grand Avenue
Bellingham, Washington 98225
(206) 676-6784
Attorney for Appellant
David S. McEachran

CHRISTOPHER T. BAYLEY,
*King County Prosecuting Attorney*
THOMAS A. GOELTZ,
JOHN E. KEEGAN,
ROBERT D. JOHNS,
*Deputy Prosecuting Attorneys*
King County Prosecuting
Attorney's Office
King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 344-7398
Attorneys for Appellant
Christopher T. Bayley
ELDON V. C. GREENBERG,
RICHARD A. FRANK,
Center for Law and Social Policy
1751 N Street, N.W.
Washington, D.C. 20036
(202) 872-0670
THOMAS H. S. BRUCKER,
Durning, Smith & Brucker
1411 Fourth Avenue
Seattle, Washington 98101
(206) 624-8901
Attorneys for Appellants
Coalition Against Oil Pollution
National Wildlife Federation,
Sierra Club, and Environmental
Defenses Fund, Inc.

# TABLE OF CONTENTS





TABLE OF CONTENTS (Cont.)

TABLE OF CONTENTS (Cont.)



## CITATIONS

### CONSTITUTIONAL PROVISIONS



### CASES





CASES (Cont.)

CASES (Cont.)





CASES (Cont.)

CASES (Cont.)



## FEDERAL STATUTES





FEDERAL STATUTES (Cont.)



## INTERNATIONAL AGREEMENTS



## CONGRESSIONAL MATERIALS

CONGRESSIONAL MATERIALS (Cont.)





CONGRESSIONAL MATERIALS (Cont.)



## FEDERAL ADMINISTRATIVE MATERIALS



## STATE STATUTES

IN THE

# SUPREME COURT

OF THE

UNITED STATES

---

October Term, 1976

---

No. 76-930

---

DIXY LEE RAY, Governor of the State of Washington, et al.,

*Appellants,*

v.

ATLANTIC RICHFIELD COMPANY, et al.,

*Appellees.*

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

---

## BRIEF OF APPELLANTS

---

## OPINION BELOW

The opinion of the three-judge district court is reported in *Atlantic Richfield Company v. Evans*, ..... F. Supp. ....., 9 E.R.C. 1876 (W.D. Wash., 1977). A copy of the opinion is included in the Jurisdictional Statement as Appendix C, pages 5a through 12a.

## JURISDICTION

This is a direct appeal from an order granting a permanent injunction issued pursuant to 28 U.S.C. §§ 2281 and 2284 against enforcement of a state statute. The order was entered by the United States District Court for the Western District of Washington November 12, 1976, and is set forth in the Jurisdictional Statement as Appendix B, p. 3a. Notice of appeal was filed in the United States District Court, Western District of Washington, on November 19, 1976, and is set forth in the Jurisdictional Statement as Appendix E, pp. 14a-20a. Jurisdiction of this Court is invoked under 28 U.S.C. § 1253, which authorizes an appeal to the Court from such an order of a three-judge district court. *Moe v. Confederated Salish and Kootenai Tribes, Etc.*, 421 U.S. 707 (1976). The Court noted probable jurisdiction on February 28, 1977. 97 S. Ct. 1172 (1977).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The primary constitutional and statutory provisions involved in this case are the Supremacy and Commerce Clauses of the United States Constitution (Article VI, Clause 2; Article I, Section 8, Clause 3); Chapter 125, Laws of Washington, 1975, First Extraordinary Session, codified at Wash. Rev. Code §§ 88.16.170 *et seq.* ("Chapter 125"); and the Ports and Waterways Safety Act of 1972, Pub. L. No. 92-340, 86 Stat. 424, 33 U.S.C. §§ 1221 *et seq.*, and 46 U.S.C. § 391a (the "PWSA"). They are set forth



in the Jurisdictional Statement as Appendix G, H, I, and J, respectively.

Other provisions of the United States Constitution involved are the Treaty Making Clause (Article II, Section 2, Clause 2) and Amendment XI to the United States Constitution. They are set forth in the Jurisdictional Statement at Appendix K and L, respectively.

## QUESTIONS PRESENTED

In 1975 the State of Washington enacted legislation, Chapter 125, designed to protect certain highly valued and economically important navigable waters, their underlying beds and adjoining shorelines of the State of Washington against damage arising from spills of oil carried, in very substantial quantities, by large oil tankers. This appeal presents the following principal question:

> Whether the historic police powers of a state to protect its citizens and navigable water resources from oil pollution, by ensuring safe methods of oil transportation by tankers in its inland marine waters, have been wholly ousted by the Ports and Waterways Safety Act of 1972—a federal statute which does not express an explicit intent to do so and which creates a scheme compatible with continuing state regulation?

Related questions before the District Court, but not answered by the Court, are:

> Whether Chapter 125 is invalid on the basis it impermissibly conflicts with:

1. Other federal statutes affecting oil tankers,
2. International agreements, or
3. The Commerce Clause.

A final question presented is:

> Whether, in light of the Eleventh Amendment to the United States Constitution, the District Court erred in denying a motion to dismiss the defendant officials of the State of Washington, Governor Dixy Lee Ray, et al.?

## STATEMENT OF THE CASE

### A. Parties And Prior Proceedings

Chapter 125 became effective on September 8, 1975. On the same day, Atlantic Richfield Company ("ARCO"), which owns and operates an oil refinery and related facilities at Cherry Point, Washington, filed a Complaint in the United States District Court for the Western District of Washington seeking a judgment declaring the State statute unconstitutional and void, and enjoining its enforcement. Named as defendants were State officials responsible for enforcement of Chapter 125, including Daniel J. Evans, Governor of the State of Washington,[1] Slade Gorton, Attorney General of the State of Washington, the five members of the Board of Pilotage

[1]On January 12, 1977, Dixy Lee Ray became Governor of the State of Washington and John C. Hewitt became chairman of the Board of Pilotage Commissioners. Pursuant to Rule 48(3) of the Rules of the Supreme Court, they have been substituted respectively as appellants for former Governor Evans and for James Rondeau, successor of William C. Jacobs.



Commissioners of Washington and David S. McEachran, Prosecuting Attorney of Whatcom County, the county in which ARCO's refinery is located.[2]

All who are acquainted with the State of Washington know of Puget Sound and its great significance to the essential character of the State and its citizens.[3] The case involves the validity of a state legislative enactment designed to protect Puget Sound, its waters, beds and adjacent uplands, from damage arising from the spillage of oil carried by extremely large oil tankers as they ply Puget Sound and adjacent waters. Chapter 125 provides, in its first section, the following findings:

> Because of the danger of spills, the legislature finds that the transportation of crude oil and refined petroleum products by tankers on Puget Sound and adjacent waters creates a great potential hazard to important natural resources of the state and to jobs and incomes dependent on these resources.
> The legislature also recognizes Puget Sound and adjacent waters are a relatively confined salt water environment with irregular shorelines

[2]Christopher T. Bayley, Prosecuting Attorney of King County, and four non-profit environmental organizations—National Wildlife Federation, Sierra Club, Environmental Defense Fund, Inc. and Coalition Against Oil Pollution, intervened as defendants in the District Court. Seatrain Lines, Inc. (Seatrain) intervened as a plaintiff in the District Court, Seatrain, a Delaware corporation with its principal place of business in New York, builds, owns and operates vessels.

[3]"Puget Sound" is described for purposes of this proceeding as that area including the marine waters within the State of Washington lying east of a line drawn from Discovery Island Light (on the southern tip of Vancouver Island, British Columbia) to the new Dungeness Light (approximately halfway between Port Townsend and Port Angeles, Washington). A map setting forth the western one-third of the State of Washington, including Puget Sound, is attached to the inside back cover of this brief.

and therefore there is a greater than usual likelihood of long-term damage from any large oil spill.

The legislature further recognizes that certain areas of Puget Sound and adjacent waters have limited space for maneuvering a large oil tanker and that these waters contain many natural navigational obstacles as well as a high density of commercial and pleasure boat traffic.

Section 1 closes by describing the "intent and purpose" of the chapter to be:

> [T]o decrease the likelihood of oil spills on Puget Sound and its shorelines.

The means provided to reach this "intent and purpose" are three:

1. Section 2 thereof requires that "* * * any oil tanker * * * of fifty thousand deadweight tons or greater, shall be required to take a Washington State licensed pilot while navigating Puget Sound * * *."[4] Wash. Rev. Code § 88.16.180.

2. Section 3(1), the "access limit", prohibits any oil tanker of more than 125,000 deadweight tons (DWT) from entering Puget Sound. Wash. Rev. Code § 88.16.190(1).

3. Section 3(2) provides that an oil tanker of 40,000 to 125,000 DWT may enter Puget Sound if it either:

(a) Possesses the following safety features: minimum shaft horsepower of at least one horsepower for each 2.5 DWT; twin screws;

[4]The term "deadweight tons" is defined by the Washington State Board of Pilotage Commissioners for purposes of Chapter 125 as the cargo-carrying capacity of a vessel, including necessary fuel oils, stores, and potable water, as expressed in long tons (2240 pounds equals one long ton).



double bottoms underneath all oil and liquid cargo spaces; two radars, one of which must be collision-avoidance radar; and any other navigational systems as may be prescribed by the Board of Pilotage Commissioners; *or*

(b) Is "* * * under escort of a tug or tugs with an aggregate shaft horsepower equivalent to five percent * * *" of its deadweight tonnage ("tug escort"); *or*,

(c) Is in ballast. Wash. Rev. Code § 88.16.190(2).

The provisions of Chapter 125 are precisely drawn to address problems of large oil tanker movement on Puget Sound. The principal operative provision is the "tug escort." In practice, tankers have not incorporated the alternative design and equipment features of Section 3(2), Chapter 125. These design and equipment features are optional under the state regulatory scheme; in essence they constitute a legislative expression of what the State would like to see incorporated on tankers used in Puget Sound in order to protect these ecologically sensitive waters. Since September 8, 1975, the effective date of Chapter 125, all tankers between 40,000 and 125,000 DWT have used tug escorts; no tanker has been denied entry to Puget Sound for failure to have the alternative design features of Section 3(2).

The other operative provision of Chapter 125 is the access limit. The access limit reflects the State's concern about the movement of supertankers in the confined waters of Puget Sound.

ARCO's primary claims were that Chapter 125

was invalid under the Supremacy Clause of the United States Constitution (Article VI, Clause 2), because it had been preempted by federal law, particularly the PWSA, and that Chapter 125 imposed an undue burden on interstate commerce in violation of the Commerce Clause of the United States Constitution (Article I, Section 8, Clause 3).[5] ARCO also claimed Chapter 125 was invalid based upon federal foreign affairs and treaty-making powers. Because the action sought injunctive relief against enforcement of a state statute on the grounds of unconstitutionality, a three-judge court was convened pursuant to 28 U.S.C. §§ 2281, 2284, to determine the case.

Although ARCO in its Complaint requested a temporary injunction, it did not pursue that request and no preliminary relief was issued by the District Court. ARCO continued to comply with Chapter 125 during the pendency of the litigation in the District Court.

The District Court heard the case on June 25, 1976, upon an agreed statement of facts.

On September 23, 1975, the District Court, relying upon the PWSA, held that Chapter 125 was void on the basis that federal law has "preempted the field."[6] (Juris. St., App. C, p. 7a). The District Court

[5]ARCO's challenge relies in large measure upon the Ports and Waterways Safety Act of 1972. That act authorizes the Coast Guard to establish vessel traffic systems in selected ports and waterways (Title I) and to impose minimum standards for the design, construction and operation of oil tankers (Title II). The Act's provisions are discussed in detail *infra*.

[6]The District Court also held, contrary to the contention of the defendant officials of the State of Washington, that the Eleventh Amendment of the United States Constitution did not preclude the District Court's jurisdiction. In so ruling, the District Court wrote:

> Aware of the rule in *Ex Parte Young*, 209 U.S. 123 (1908), the State invites us to "overrule" it, or at least to restrict the scope of cases falling within the *Young* "exception" to the Eleventh Amendment. The invitation is attractively and persuasively argued, but we decline it. The Supreme Court, if it chooses to do so, will have ample opportunity to reconsider *Young*. (Juris. St., App. C, p. 11a.)

[7]See the Order of the District Court, dated November 12, 1976. (Juris. St., App. B, p. 3a.)

[8]The order of Justice Rehnquist, dated December 9, 1976, and the Order of this Court, dated January 10, 1977 appear at (A. 370) and (A. 373), respectively ..... U.S. ....., 97 S. Ct. 544 (1976), ..... U.S. ....., 97 S. Ct. 729 (1977).



did not "reach" the other contentions raised by ARCO. (Juris. St., App. C, p. 12a). A judgment declaring Chapter 125 invalid was entered on September 24, 1976.

The District Court on November 12, 1976, entered an order enjoining the enforcement of Chapter 125.[7] At the request of the Appellants, the District Court stayed the effectiveness of the injunction until December 15, 1976. The Appellants by application filed with this Court on December 6, 1976, sought a further stay of the mandate of the District Court. On December 9, 1976, Mr. Justice Rehnquist referred the application for a stay to the full Court at the conference following December 10, 1976, and continued the stay of the District Court's mandate pending further order. On January 10, 1977, the full Court granted the stay pending final disposition of the appeal by the Court.[8]

All Appellants request that the Court reverse the District Court decision by holding that Chapter

125 is valid.[9] In addition, the State of Washington appellants, Governor Dixy Lee Ray, et al., request that the Court reverse the District Court's conclusion it had jurisdiction over them.

B. **Puget Sound And Its Adjacent Shorelands.**

1. **Physical environment.**

Puget Sound is a beautiful and extremely valuable body of inland water located in northwest Washington. Connected to the Pacific Ocean and Washington's seacoast by the 75 mile long Strait of Juan de Fuca, its sinuous arms penetrate deeply into Western Washington. Puget Sound is an estuary[10] consisting of 2500 square miles of inlets, bays and channels; in its northern part are the San Juans, the

[9]Appellants do not challenge that part of the lower court decision which held invalid that portion of Section 2 of Chapter 125 which required "enrolled vessels," *i.e.*, vessels engaged in trade between United States ports, to take state licensed pilots. Appellants recognize that the interaction of 46 U.S.C. § 215 and 46 U.S.C. § 364, as construed by the Court, see *Sprague v. Thompson*, 118 U.S. 92, 95-96 (1886) and *Anderson v. Pacific Coast Steamship Co.*, 225 U.S. 187 (1912), precludes regulation of pilotage on such vessels. It must be emphasized that the pilotage requirement of Section 2 is plainly valid insofar as it is applied to "registered" vessels; *i.e.*, vessels trading between United States and foreign ports whether flying United States or foreign flags. Moreover, under the Court's decision in *Anderson v. Pacific Coast Steamship Co., supra*, the Washington State pilotage requirement may be applied to vessels in coastwise trade, carrying federally licensed pilots aboard, if such vessels are "registered." This minor defect in Chapter 125 has no detrimental impact upon the validity of the remainder of the Chapter because of the long recognized and firmly established concept of severability embodied in Washington State law and the "severability clause" of the 1975 state enactment. Section 6, Chapter 125, Laws of Washington, 1975 1st Ex. Sess.; *State v. Anderson*, 81 Wn.2d 234, 501 P.2d 184 (1972); *Boeing Co. v. State*, 74 Wn.2d 82, 442 P.2d 970 (1968).

[10]Estuaries are zones of ecological transition between fresh and salt water. There is water and light in the estuarine zone, together with dissolved nutrients derived from both land and sea. (A. 68.)



State's magnificent and unique island cluster. More than 200 islands are found throughout Puget Sound, and numerous marshes, tidal flats, wetlands and narrow beaches, often backed by cliffs, are characteristic of the more than 2,000 miles of shoreline. The distinctive topographic characteristics of Puget Sound are shared by no other large estuarine system in the United States outside of Alaska[11] (A. 69.)

2. **The multiple values and uses of Puget Sound.**

The importance of Puget Sound to Washington arises both from its estuarine character and its proximity to Washington's residents. It provides highly productive habitats and serves as spawning and nursery areas for over 2,000 different marine species.[12] (A. 68, 69.) Further, Puget Sound provides year round as well as migratory habitats for waterfowl and wintering areas for waterfowl from Alaska, Western Canada and Eastern Russia.[13] (A. 72.) Additionally, the waters and shorelines of Puget Sound provide employment, recreational, scientific and educational opportunities and support navigation, commerce and other water related economic uses. Since approximately 65% of Washington's citizens reside within the twelve counties which border on Puget Sound, its waters and shorelines are

[11]The only other comparable estuarine systems are Cook Inlet, Prince William Sound and Alexander Archipelago, all in Alaska.

[12]For example, resident mammals include whales, sea lions, seals and porpoises. (A. 72.)

[13]Puget Sound is one of the habitats in the United States of the Bald Eagle. Larrison and Sonnenberg, *Washington Birds*, (90-91) (1968).

accessible to and subject to multiple, and at times competing, uses. (A. 73, 75.)

Washington and its citizens have a substantial economic interest in the natural resources of Puget Sound. The value of the beds, tidelands and waterfront lands adjacent to Puget Sound are estimated to exceed $2,000,000,000.[14] (A. 73.) The State has a substantial proprietary interest in these lands, owning nearly all of the beds and approximately 43% of the tideland frontage. (A. 73.) The Puget Sound fisheries industry, including commercial and sport fishing, packing and canning, contributes $170,000,000 annually to Washington's economy.[15] (A. 71.) Puget Sound also supports aquaculture programs, including commercial clam and oyster farming and salmon rearing.[16]

Puget Sound and its adjacent uplands are also significant recreational resources for the State, supporting tourism[17] and resident recreational activities

[14]This valuation excludes all industrial, commercial and residential improvements. (A. 73.)

[15]These figures are based on State of Washington estimates for 1973, including finfish harvest (e.g. salmon, steelhead, herring, smelt and lingcod) and shellfish harvest (e.g. crab, oyster, clam and octopus). (A. 71.)

[16]For example, the Lummi Indian Tribe conducts an aquaculture program for the propagation and sale of salmon, steelhead, trout, and oysters at a site only five miles from ARCO's refinery. The federal government has expended a total of $3.4 million dollars on behalf of the aquaculture program of the Tribe. (A. 72.) Total employment in the State in the aquaculture industry is approximately 1250-1500. (A. 72.)

[17]The State of Washington estimates in 1973 that $92.1 million was spent by tourists in the twelve counties adjacent to Puget Sound. (A. 74.)



such as boating, swimming, water skiing and scuba diving. Puget Sound residents own a multitude of pleasure boats and in the summer literally thousands of these craft are cruising throughout Puget Sound. Access to the Sound is provided in part by 158 federal, state and local parks and recreation sites. (A. 74.)

Puget Sound is the site of a number of fish and wildlife preserves, including 13 federal refuges, 2 state oyster preserves and 4 bird refuges operated by a non-profit conservation organization. (A. 74.) In addition, a number of colleges and universities, state agencies and the National Oceanic and Atmospheric Administration conduct research and educational programs through marine stations located in Puget Sound.[18]

### 3. Oil transport on Puget Sound.

Located on the uplands adjacent to Puget Sound are six oil refineries. (A. 44-45, 47-48.) These refineries have a total combined processing capacity of 359,500 barrels of oil per day. (A. 44-45, 47-48.) The four largest, including ARCO's at Cherry Point, are situated in northern Puget Sound, which contains most of the Sound's 200 islands, passes and channels (map).

The refineries are supplied by tankers which carry vast quantities of oil. A tanker of 120,000 DWT

[18]The University of Washington annually spends $1 million on its Institute of Marine Studies at Friday Harbor on San Juan Island. Its marine station borders the main oil shipping route to ARCO's refinery. Several other marine stations are located near Puget Sound oil refineries. (A. 75, and Exhibit G.)

has the capacity to carry approximately 34,500,000 gallons of oil.[19] (A. 45, 80.) The tanker route through Puget Sound to ARCO's refinery is through Rosario Strait, one of the narrowest shipping channels in the Sound.[20] (A. 64, and Ex. G.) Further, there are depth limitations on supertankers.[21] Portions of the shipping route to ARCO's refinery have a depth of only 60 feet. (A. 65.) Five of the six refineries on Puget Sound cannot dock a tanker greater than 125,000 DWT because the dockside depth will not accommodate the draft of such a vessel. (A. 47-48, 80.) Only ARCO can receive tankers greater than 125,000 DWT, but it is also restricted by a dockside depth of 55 feet. (A. 55.) The natural navigational hazards, as well as the "high density of commercial and pleasure boat traffic," Chapter 125, Section 1. (Wash. Rev. Code § 88.16.170) are compounded

[19]A tanker of the 40,000 to 125,000 DWT class is huge. For example, a 120,000 DWT tanker has an approximate draft of 52 feet, a width of 138 feet and a length of 850 feet, almost three times longer than an American football field. Further, the immensity of the supertankers excluded from Puget Sound by Chapter 125, i.e., those greater than 125,000 DWT, is difficult for most people to comprehend. (A. 80.) The general physical dimensions of an "oil-berg" of 250,000 DWT is 1,085 feet long by 170 feet wide, with a draft of 65 feet. Vessels of this class dwarf more well-known ships such as the "Queen Mary" (81,237 DWT). 25 Encyclopedia Americana 544 (1962). The Court had occasion to consider the size of these oil tankers, noting that ship officers have been issued bicycles to patrol the decks of a 166,890 ton oil tanker. *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 340 (1973).

[20]At its narrowest point the Rosario Strait passageway is less than one-half mile wide. (Ex. G.)

[21]A 120,000 DWT tanker has a draft of 52 feet and a 190,000 DWT tanker has a draft of 61 feet. (A. 80.) Vessel draft refers to the distance the hull extends below the waters' surface.



by tidal currents, fog and visibility limitations and prevailing winds. (A. 69, and Exs. G and I.)

These tankers are remarkable for their lack of maneuverability. Congress noted the "propulsion units [on 250,000 ton tankers are] the equivalent to a one-third horsepower motor on a 40-foot boat." S. Rep. No. 92-724, 92d Cong., 1st Sess. 18 (1972). ("PWSA Senate Report"). The stopping distance of 120,000 and 190,000 DWT tankers at 16 knots is almost two and one-half and three and one-half miles respectively. (A. 80.) Congress also noted that during a " 'crash stop' procedure, the vessel cannot be adequately steered." PWSA Senate Report at 18.

The vast amounts of oil carried by tankers, plus the problems of maneuverability in the face of navigational obstacles on Puget Sound, create substantial risks of oil pollution. In the year preceding enactment of Chapter 125, three oil tanker polluting incidents of major proportion occurred worldwide. (A. 81.) And things are getting worse, not better. On January 11 of this year, Chairman Magnuson in his opening remarks in the Hearings on Recent Tanker Accidents before the Senate Commerce Committee, 95th Cong., 1st Sess., 1-2, ser. 95-4 (1977), made two alarming observations:

> [T]his country has just witnessed the worst rash of tanker accidents ever.

He continued with this sad statement:

> And on top of that, last year was the worst for

> vessel losses in history. These ships seem to be going down everywhere.
>
> Those of us who have studied this area closely feel that the worst may be yet to come. In other words, what is possible is going to happen. * * * * Harbors are congested; our vital waterways are dangerously crowded. * * * *

In the first nine months of 1976, prior to the calamities of the winter of 1976-77, nearly 200,000 tons of oil were spilled—more than in any previous year.[22] Few incidents have brought home the reality of the risks of oil spills more than the grounding of the Argo Merchant, which spilled approximately 7.3 million gallons off Nantucket Island, Massachusetts.

Fortunately, Puget Sound has not yet experienced a major oil spill. However, there have been at least 13 tanker casualties and there have been oil spills by tankers in transit and at dockside on Puget Sound. (A. 121-122, and Ex. P.) Moreover, Alaskan oil is expected to begin flowing in 1977. The oil industry plans to transport by tanker 15% of the Alaskan oil to the Puget Sound area. (A. 49.) Thus, the potential for a disastrous spill is ever present and growing.

An oil spill on Puget Sound has significant potential for destruction of or damage to the marine life of Puget Sound, industry and jobs dependent thereon, as well as damage to publicly and privately owned property. (A. 76.) The National Academy

[22]Tanker Advisory Center, Worldwide Tanker Casualty Returns: Third Quarter 1976 (December 23, 1976). Hearings on Recent Tanker Accidents before the Senate Commerce Committee, 95th Cong., 1st Sess., 244-47, ser. 95-4 (1977).



of Sciences has found estuaries, such as Puget Sound, are "particularly vulnerable" to oil spill damages. (A. 79.) While the extent of damages to natural resources varies with the circumstances of a particular oil spill, the greater the amount of oil spilled, the greater is the potential injury, death or damage. (A. 76.) The spillage of oil may impair Puget Sound waters, beaches and shorelines for a number of public uses. (A. 76.) Since the Sound contains numerous islands and irregular shorelines, oil may quickly reach beaches and the shore. It is unknown whether a spill on Puget Sound greater than approximately 476 barrels can be contained and cleaned up without significant property damage first occurring. (A. 84.) Even a spill contained prior to reaching shore may cause economic and environmental damage, as well as high costs of cleanup.[23]

**4. Washington State has responded to the risk of oil spillage.**

Protection of Puget Sound from oil pollution has been and is now the centerpiece of Washington's effort to preserve water quality. Over the past ten years, the State has enacted extensive legislation to protect the Sound,[24] and federal, state and local gov-

[23]There has been one spill on Puget Sound of approximately 476 barrels (20,000 gallons). The cleanup cost for this spill exceeded $50,000. (A. 84.)

[24]Following the mandates of federal water pollution control laws, the State established substantially all of the waters of Puget Sound as Class AA "extraordinary" waters—the highest classification given to any waters. Washington Administrative Code § 173-201-080(120). After this designation, the State set upon establishing an integrated program of insuring the integrity of Puget Sound's water

ernments have expended hundreds of millions of dollars to enhance the Sound's water quality. In 1975, in response to increasing traffic of large oil tankers and the navigational constraints of Puget Sound, the State adopted Chapter 125. The scheme of protection against oil spill risks contemplated by Chapter 125 is an integral part of the overall effort of the State of Washington to preserve and enhance the environmental quality of Puget Sound.

5. **The impact of Chapter 125 on oil transportation on Puget Sound.**

Because ARCO and others have complied with Chapter 125 since September 8, 1975, appreciation of the impact of Chapter 125 on oil tanker operations is based in part on actual experience. Chapter 125 has not caused any reduction in the amount of oil processed at any Puget Sound refinery. (A. 68.) The Puget Sound refineries are being fully supplied by tankers of less than 125,000 DWT. Since these tank-

against the threat from oil spills. In rapid succession, during 1969 through 1971, the State established an oil spill clean-up capability (Wash. Rev. Code § 90.48.330), strict liability for damages caused by oil spills (Wash. Rev. Code § 90.48.335), and the regulation of the "* * * times, places and methods * * *" of transferring of oil from ship to shore (Wash. Rev. Code 90.48.380). Further, the Shoreline Management Act of 1971 designates most of Puget Sound a "shoreline of statewide significance" where drilling for oil is prohibited. (Wash. Rev. Code § 90.58.030(2)(3); and Wash. Rev. Code § 90.58.160.) As part of the State's continuing effort to prevent and control oil pollution, "a continuing, comprehensive program of systematic baseline studies" of Puget Sound and other State marine waters was established in 1973. Wash. Rev. Code § 43.21A-.410. This long-term effort was coupled with the authorization of a feasibility study of "offshore monobuoy and related petroleum facilities." Section 14, Chapter 197, Laws of Washington, 1974, First Ex. Sess.



ers do not possess the design and equipment features enumerated in Section 3(2) of Chapter 125, (Wash. Rev. Code § 88.16.190), oil tankers between 40,000 DWT and 125,000 DWT are using the alternative compliance mechanism of tug escorts while navigating Puget Sound. The cost of compliance for those tankers is only the cost of tug escort. Tankers calling at ARCO's refinery have experienced a tug escort fee of approximately $7,500, or $.0087 per barrel, for a 120,000 DWT tanker. (A. 68.) This cost compares with the total transportation cost of crude oil from Valdez, Alaska to Puget Sound of approximately $.40 per barrel and from the Persian Gulf to Puget Sound of $1.40 per barrel for a 120,000 DWT tanker. (A. 63, 64.)

Chapter 125, as a practical matter, has had and will continue to have little impact on supertanker use on Puget Sound. Prior to the effective date of Chapter 125, only six vessels (15 calls) greater than 125,000 DWT ever entered Puget Sound. (A. 46, 113.) The largest of these supertankers was a 138,-000 DWT vessel. (A. 113.) ARCO, the only Puget Sound refinery able to handle 125,000 DWT tankers, intends to supply its entire refinery capacity with Alaskan oil beginning in 1977. (A. 45, 49.) By law, this Alaskan oil must be shipped to Puget Sound by United States flag vessels. (A. 88.) In the whole United States flag fleet, there are only four tankers greater than 125,000 DWT. (A. 58-59.) ARCO has never used and does not intend to use these four

tankers to serve its Puget Sound refinery. (A. 59.) Rather, ARCO intends to use seven existing tankers in the Alaska-West Coast trade, none of which is greater than 125,000 DWT.[25] (A. 50.)

Chapter 125 is a statute of modest impact on oil transportation through Puget Sound. Chapter 125 is a State police power exercise which, by striking a balance between competing land and water uses on Puget Sound, is designed to protect extremely valuable resources against the very great risks of oil spills.

## SUMMARY OF ARGUMENT

Chapter 125 is a valid exercise of the State of Washington's police power, which is not in conflict with and not expressly or implicitly preempted by the Ports and Waterways Safety Act. Chapter 125 is part of a comprehensive State effort, encouraged by a variety of federal legislation, to preserve and promote the environmental integrity and associated economic and human values of a delicate inland marine waterbody, *i.e.*, Puget Sound. The provisions of Chapter 125 are tailored to the local conditions and values of Puget Sound for the purpose of reducing the substantial risks of oil spillage from tankers.

[25] ARCO has contracted for construction of two tankers of 150,000 DWT which are intended for West Coast Trade. (A. 50.) Alaskan oil is intended for Long Beach, California and San Francisco, California, as well as Puget Sound. (A. 49.) There are presently monobuoys off the coast of California near Long Beach, one of which can accommodate tankers with a draft of 56 feet. (A. 50.) The two tankers of 150,000 DWT which have been contracted for by ARCO will have a draft of 55 feet. (A. 50.)



It is undisputed that all oil tankers navigating Puget Sound can comply with all federal regulations as well as with Chapter 125. Full compliance with both federal and state regulation has occurred since September 8, 1975, the effective date of Chapter 125.

Congress did not expressly preempt Chapter 125. Neither the language nor the legislative history of the PWSA contains the required clear and manifest indication of preemptive intent. Title I of the PWSA, which provides the Coast Guard with discretionary power to establish vessel traffic systems in congested waters, expressly recognizes and contemplates continued regulation in local waters by state and local authorities. Indeed, a number of existing local traffic control schemes were called to the attention of Congress prior to enactment of the PWSA, and Congress did not indicate when adopting the PWSA that such local control was precluded. While one section of Title I, which preserves state authority to set higher standards for onshore structures, may preclude by implication some aspect of state authority over vessels, the provisions of Chapter 125 are not embraced within even the broadest reading of any negative implication of this section. The types of controls contained in Chapter 125 are unrelated to the vessel traffic system which the Coast Guard has established for portions of Puget Sound. Title II of the PWSA contains no language of preemption. In fact, its reference to the "minimum standards" to be set by the Coast Guard strongly

suggests other governmental bodies, such as states, may set more stringent requirements to meet local conditions.

Chapter 125 is not implicitly preempted. The PWSA does not constitute a pervasive federal scheme which leaves no room for supplemental state action. Even if the PWSA were construed as granting broad authority to the Coast Guard to act in certain ports and waters, that grant of authority in itself cannot be deemed as demonstrating a congressional intent to oust all state regulation. Given the scope of the oil tanker pollution problem, comprehensive federal authority is both likely and appropriate wholly apart from any preemptive intent. Significantly, neither the PWSA nor its implementation is all-inclusive. Chapter 125 is a response to the particular navigational hazards of Puget Sound and has no impact on any national transportation system. Further, the goals of Chapter 125 and the PWSA are similar, and the provisions of Washington's law support, rather than obstruct, federal efforts to protect marine environments from the risks of oil pollution.

Far from reflecting a "Balkanization" of regulatory authority, Chapter 125 is the kind of creative state effort, consistent with and supplemental to federal efforts, needed in a healthy federal system.

The District Court did not reach several claims raised below by ARCO. If it had, it would have found that Chapter 125 is consistent with all federal laws dealing with certification and registration of



vessels and the Merchant Marine Act. Similarly, since the type of regulation contained in Chapter 125 is not the subject of any treaty or convention, Chapter 125 does not interfere with international agreements or the ability to conduct foreign affairs. Further, Chapter 125 does not interfere with any needed uniformity in or create an impermissible burden on interstate commerce.

Finally, the appellant State of Washington public officials contend that the Eleventh Amendment to the Constitution precluded the federal district court from entertaining ARCO's challenge to the validity of Chapter 125.

## ARGUMENT

### I. CHAPTER 125 IS NOT IN CONFLICT WITH AND HAS NOT BEEN EXPRESSLY OR IMPLICITLY PREEMPTED BY THE PORTS AND WATERWAYS SAFETY ACT.

Pursuant to the Supremacy Clause of the Constitution, Article VI, Clause 2, state legislation is presumed valid unless an actual conflict exists between state and federal regulations or Congress curtails or totally ousts state regulation of a subject area. Congress may expressly preempt by so declaring in federal legislation. In addition, a court may find implicit in federal regulation a congressional intent to preempt even consistent or supplemental state regulation. However, in the absence of clear evidence of such congressional intent, the Tenth

Amendment to the Constitution preserves the authority of states to exercise their traditional police powers.

The District Court, construing the PWSA for the first time, held this statute preempted the entire field of oil tanker regulation. (Juris. Stat., App. C, p. 7a.) The sweeping preemption holding of the District Court radically upsets an area of traditional state authority, ousting coastal states from their historically recognized police powers over coastal and harbor uses to prevent oil pollution directly. The result of the District Court's holding is that state legislatures are stripped of vitally important powers to protect state resources and the jobs and industry dependent on those resources. Such a far-reaching result cannot have been, and indeed, was not intended by the framers of the PWSA.

Chapter 125 represents the exercise of the State of Washington's police power to conserve land and water resources and to promote the general welfare of its citizens by maintaining the quality of the State's waters.[26] The distribution of oil by tanker in the State involves inseparable land use, water use and water pollution problems. Normal tanker traffic, as well as casualties from oil spillage, substantially affect and may alter the use of both water and adjacent land. Traditionally, land use authority has been the prerogative of state government.[27] For ex-

[26]ARCO has never claimed that Chapter 125 is not a valid exercise of the police power of the State.

[27]*See, e.g., Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).



ample, the decision whether to allow an oil refinery and the authority to control its location, size and other features reside with state and local governments.[28] The District Court decision creates an inconsistent situation whereby state and local governments have absolute veto power over refinery location on Puget Sound to protect land and water resources, yet would be ousted of any authority to protect those same resources from hazards created by the transportation of crude oil across State waters to local refineries.

It is well recognized that innovative state environmental legislation, enacted by those who are often better equipped to resolve particular local problems, is integral to a healthy federal system. *See, e.g., Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973); *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960); *Manchester v. Massachusetts*, 139 U.S. 240 (1891); *Skiriotes v. Florida*, 313 U.S. 69 (1941);[29] *cf., National League of Cities v. Usery*, 426 U.S. 833 (1976).

The salutary power of the states to act does not

[28]ARCO submitted to zoning requirements in seeking a location for its Puget Sound refinery. The refinery location that ARCO previously sought in Snohomish County on Port Susan Bay was denied in 1969, and the denial upheld by the Washington State Supreme Court, because of its potential "detrimental effect on water and land resources." *Chrobuck v. Snohomish County*, 78 Wn.2d 858, 872, 480 P.2d 489 (1971).

[29]Lower federal and state courts have reached similar conclusions. *See, e.g., Proctor & Gamble Co. v. Chicago*, 509 F.2d 69 (7th Cir.), *cert. denied*, 421 U.S. 978 (1975); *American Can Co. v. Oregon Liquor Control Comm'n*, 15 Ore. App. 618, 517 P.2d 691 (1973); *review denied. Id.* at 691 (Ore. 1974); *Marshall v. Consumers Power Co.*, 66 Mich. App. 237, 237 N.W.2d 266 (1975).

stop at the water's edge. Since *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851), the Court has consistently emphasized that the different needs and unique features of different port areas demand particularized local regulation.[30] Thus, for example, in *Packet Co. v. Catlettsburg*, 105 U.S. 559, 563 (1881), the Court upheld local harbor regulations prescribing times and locations for the landing of vessels, stating:

> [The regulation] belongs also, manifestly, to that class of rules which, like pilotage and certain others, can be most wisely exercised by local authorities, and in regard to which no general rules, applicable alike to all ports and landing places, can be properly made.

State police power control of vessels is long-standing and extensive.[31]

---

[30]The Court stated in *Cooley*, 53 U.S. (12 How.) at 320:

> [T]he nature of the subject [pilotage] * * * is such as to leave no doubt of the superior fitness and propriety, not to say the absolute necessity, of different systems of regulation, drawn from local knowledge and experience, and conformed to local wants.

[31]*See, e.g., Morgan's S.S. Co. v. Louisiana Board of Health*, 118 U.S. 455 (1886) (upholding state maritime quarantine regulations); *Anderson v. Pacific Coast S.S. Co.*, 225 U.S. 187 (1912) (upholding state pilotage requirements for "enrolled vessels" in coastwise trade which are "registered"); *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245 (1829) (upholding state construction of a dam blocking navigable waters); *Escanaba Co. v. Chicago*, 107 U.S. 678 (1882) (upholding state construction of bridge partially obstructing traffic on navigable waters); *Transportation Co. v. Parkersburg*, 107 U.S. 691 (1882) (upholding local fees for wharfage imposed on vessels in interstate commerce); *Pound v. Turck*, 95 U.S. 459 (1877) (upholding state construction of dam blocking traffic on navigable river); *see also Kelly v. Washington*, 302 U.S. 1 (1937); *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960); *Portland Pipe Line Corp. v. Environmental Improvement Comm'n*, 307 A.2d 1 (Me.), *appeal dismissed*, 414 U.S. 1035 (1973).



Only four years ago, in upholding a state oil spill liability scheme, the Court termed oil spills:

> [A]n insidious form of pollution of vast concern to every coastal city or port and to all the estuaries on which the life of the ocean and the lives of the coastal people are greatly dependent.

*Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 328-29 (1973).

Where a state has enacted legislation, such as Chapter 125, in an area of traditional state competence, the Court, in evaluating claims of preemption, begins with the strong presumption that the challenged statute is valid. The rule is that the:

> [H]istoric police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.

*Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146 (1963); *DeCanas v. Bica*, 424 U.S. 351, 357 (1976); *Jones v. Rath Packing Co.*, ..... U.S. ....., 97 S. Ct. 1305, 1309 (1977). As the Court stressed again this term, this presumption of validity:

> [P]rovides assurance that "the federal-state balance," *United States v. Bass*, 404 U.S. 336, 349 (1971), will not be disturbed unintentionally by Congress or unnecessarily by the courts.

*Jones v. Rath Packing Co., supra*, 97 S. Ct. at 1309.

Only a demonstration that complete ouster of state power—including the ouster of state power to promulgate laws not in conflict with federal laws—was plainly contemplated by Congress justifies a

conclusion that state regulation designed to protect vital state interests must give way to paramount federal legislation. *DeCanas v. Bica*, 424 U.S. 351, 357 (1976). Preemption involves:

> [T]he sensitive interrelationship between statutes adopted by the separate, yet coordinate, federal and state sovereignties * * * * [Therefore] [t]he proper approach is to reconcile "the operation of both statutory schemes with one another rather than holding one completely ousted."

*Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117, 127 (1973), quoting *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963).

In essence, three inquiries are warranted to determine whether state regulation is precluded:

A. The Court must determine whether it is possible to comply with both the state and federal regulation. *See, e.g., Northern States Power Co. v. Minnesota*, 447 F.2d 1143, 1146 (8th Cir. 1971), *aff'd mem.*, 405 U.S. 1035 (1972), citing *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963).

B. The Court must determine whether Congress has " 'unmistakably * * * ordained' " that federal law alone is to regulate a particular subject matter. *Jones v. Rath Packing Co.*, 97 S. Ct. 1305, 1309 (1977), citing *Florida Lime & Avocado Growers, Inc. v. Paul, supra.*

C. The Court must determine whether, in the absence of conflict or express preemption, preemption should be inferred in light of the nature and scope of the federal regulatory scheme. *See, e.g., Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Florida Lime & Avocado Growers, Inc. v. Paul, supra.*



Each case must necessarily turn on its own particular facts, *e.g.*, "on the peculiarities and special features of the federal regulatory scheme in question." *Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 638 (1973). In the instant case, not only is compliance with both federal and state regulation possible, but it is clear that Congress did not intend, either by express declaration or by implication, the complete ouster of state authority.

### A. There Is No Preemptive Conflict Between The Ports and Waterways Safety Act And Chapter 125 Because It Is Possible To Comply With Both Statutes.

The rule as to the existence of actual conflict is stated in *Head v. New Mexico Board of Examiners in Optometry*, 374 U.S. 424 (1963), to the effect a state statute cannot be upheld if there is found to be:

> [S]uch actual conflict between the two schemes of regulation that both cannot stand in the same area.

374 U.S. at 430, citing *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963).

Actual conflict is only found where compliance with federal and state statutes is a "physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), or where the "repugnance or conflict [is] direct and positive, so that the two acts could not be reconciled or consistently stand together." *Reid v. Colorado*, 187 U.S. 137, 148 (1902), citing *Sinnot v. Davenport*, 63 U.S. (22 How.) 227, 243 (1859).

The absence of actual conflict is demonstrated by full compliance of ARCO and others with both Chapter 125 and federal regulation since September 8, 1975, the effective date of Washington's law.[32] Obviously, the tug escort requirement and access limit for supertankers can stand consistently with the Puget Sound Vessel Traffic System (or "VTS") adopted by the Coast Guard. *See* 33 C.F.R. Part 161, Subpart B (1974).[33] That system does not involve comprehensive control of tanker movement but simply establishes separated lanes, partial radar tracking, and periodic reporting requirements.

The Vessel Traffic System is unaffected by the use of tug escorts or by the absence of supertankers greater than 125,000 DWT from Puget Sound. There is no evidence in the record which even remotely suggests, and the District Court did not find, that Chapter 125 has any effect on the operation of the Puget Sound Vessel Traffic System.

---

[32]It is clear there must be a concrete, specific conflict before a statute can be struck down. As the Seventh Circuit Court of Appeals stated in *Proctor & Gamble Co. v. Chicago*, 509 F.2d 69, 77 (7th Cir.), *cert. denied*, 421 U.S. 978 (1975), "[I]n a case involving environmental legislation it is actual conflict not potential conflict that is relevant." *See also Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 336-37 (1973); *Goldstein v. California*, 412 U.S. 546, 554-55 (1973). "[T]he teaching of this Court's decisions * * * enjoin seeking out conflicts between state and federal regulation where none clearly exists." *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 446 (1960).

[33]Although certain amendments to this system have been proposed, *see* 42 *Fed. Reg.* 3182 (January 17, 1977), they are not material to the instant litigation.



Since Chapter 125 does not *impose* any design, construction or equipment standards, no conflict is even possible. Even assuming the Coast Guard had rejected double-bottoms, twin screws, collision avoidance radar and shaft horsepower requirements as mandatory, their inclusion as an alternative to tug escorts under the State regulatory scheme poses no conflict. Further, it is beyond dispute that any oil tanker between 40,000 DWT and 125,000 DWT which has the design and equipment features embodied in Section 3(2) of Chapter 125 (Wash. Rev. Code § 88.16.190(2)) can also comply with all rules and regulations promulgated under the PWSA for vessels in both domestic and foreign trade.[34]

### B. Congress In The Ports And Waterways Safety Act Did Not "Unmistakably Ordain" That Federal Law Is Exclusive.

In order to explicitly preempt the historic police power of the state, Congress must expressly and unequivocally declare that federal authority is exclusive. *See, e.g., DeCanas v. Bica*, 424 U.S. 351, 357 (1976); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146-47 (1963); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). The PWSA does not declare federal exclusivity and the

---

[34]*See* 33 C.F.R. Part 151 (1975) (general rules for tankers in domestic trade); 33 C.F.R. Part 157 (1976) (general rules for tankers in domestic trade); 33 C.F.R. Part 157, as amended by 41 Fed. Reg. 54177 (December 13, 1976) (general rules for tankers in foreign trade); 33 C.F.R. Part 164, adopted at 42 Fed. Reg. 5955 (January 31, 1977) (navigational safety rules).

District Court found no express preemption of Chapter 125.[35]

1. **The language and the structure of the Ports and Waterways Safety Act demonstrate that no preemption is intended.**

Neither the language nor the structure of Title I of the PWSA lends itself to a finding that Congress has acted to exclude all state tanker regulation. Title I does not deal with the entire field of tanker regulation. It is legislation which grants *discretionary* authority to the Coast Guard, but which does not mandate any regulatory measures. Moreover, Title I is directed primarily toward establishing vessel traffic systems or services to ensure port safety. Section 101(1). *See generally* H. R. Rep. No. 92-563, 92nd Cong., 1st Sess. (1971) ("PWSA House Report"); PWSA Senate Report.[36] Title I does not provide the Coast Guard with authority to establish design and construction standards for vessels, and indeed, contains no provision which even relates to equipment requirements for vessels outside of the limited context of equipment needed to utilize vessel traffic services or systems. Section 101(2).

A reading of the PWSA indicates Congress did not consider this legislation to be preemptive, but rather to be additional authority to be carefully placed beside existing federal, state and local regula-

[35]ARCO did not claim that any federal legislation, other than the PWSA, explicitly preempts the matters regulated by Chapter 125.

[36]The establishment of vessel traffic systems is "the heart of the legislation." PWSA House Report at 8.



tions over the same subject. At least two sections of the PWSA not only recognize state police power authority over vessels but also contemplate continuation of state and local regulation of vessels and related matters after passage of the PWSA:

> *In determining the need for, and the substance of, any rule or regulation* or the exercise of other authority hereunder the *Secretary shall*, among other things, *consider*—
> * * * *
> (6) *Existing vessel traffic control systems, services, and schemes; and*
> (7) *local practices and customs,* * * * *
> Section 102(e), (emphasis supplied).

The statute further provides:

> In the exercise of his authority under this title * * * * [t]he Secretary may also consider, utilize, and incorporate regulations or similar directory materials issued by port or other State and local authorities. Section 102(c).[37]

The only language in the entire PWSA which could arguably indicate an intent by Congress to preempt some aspect of state authority is contained in Section 102(b), which provides:

> Nothing contained in this title [Title I] supplants or modifies any treaty or Federal statute or authority granted thereunder, nor does it prevent a State or political subdivision thereof from prescribing for structures only higher safety equipment requirements or safety stand-

[37]Section 101(5) also recognizes and preserves continued state authority. The Coast Guard may require pilots "where a pilot is not otherwise required by State law to be on board until the State having jurisdiction of an area involved establishes a requirement for a pilot in that area or under the circumstances involved."

ards than those which may be prescribed pursuant to this title. Section 102(b).

No prohibition of any state action is expressly stated. Rather, this section is phrased as a preservation of state authority over onshore structures.[38] Any negative inference of Section 102(b) regarding state authority is so ambiguous and obscure as to be insufficient, as the District Court implicitly recognized, to demonstrate the requisite congressional preemptive intent.[39]

Section 102(b) applies only to Title I of the PWSA, which is directed primarily at Coast Guard authority to establish vessel traffic systems. Moreover, by its terms, Section 102(b) refers to "safety equipment" or "safety standards". The vessel "equip-

[38]The language in Section 102(b) was in part a response to a considerable number of witnesses before the House Committee who were fearful that the Coast Guard would extend its "safety equipment requirements for structures" in Section 101(7) of the PWSA to structures only remotely related to the water and create an onshore permit program as extensive as the Army Corps' navigation permit program. *Hearings on H.R. 867, H.R. 3635, H.R. 8140 and H.R. 6332, before the Subcommittee on Coast Guard, Coast and Geodetic Survey and Navigation of the House Committee on Merchant Marine and Fisheries*, 92d Cong., 1st Sess. 141, ser. 91-12 (1971). ("*PWSA House Hearings*").

[39]Congress, it must be emphasized, knows well how to explicitly preempt state legislation. Thus, for example, in the Clean Air Act Amendments of 1970, 42 U.S.C. § 1857 *et seq.*, Congress expressly preempted the field of adopting and enforcing new car emission standards to prevent air pollution in the following language:

> *§ 1857f-6a State Standards*
> (a) No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part. No state shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as a condition precedent to the initial retail sale, titling (if any) or registration
> * * * *



ment" which the Coast Guard is authorized to require under Title I consists of "electronic or other devices necessary for the use of the [vessel traffic] service or system."[40] Section 101(2). Thus, one cannot properly conclude that Congress intended the language "safety equipment" and "safety standards" in Section 102(b) to embrace Washington's access limit, tug escort or alternative design provisions.

However, even if the broadest interpretation is taken of any negative preemptive implications of Section 102(b) upon state power, Chapter 125 is still valid. Section 102(b) specifically deals with situations in which a state may *prescribe higher standards* than those established by the Coast Guard. In this case the Coast Guard has established a vessel traffic system for Puget Sound. The requirements of Chapter 125 are unrelated to that system; thus they cannot be construed as "higher standards" which would be preempted.

Title II of the PWSA, for its part, authorizes the Coast Guard to promulgate "minimum standards" for the "design, construction, alteration, repair, maintenance and operation" of tankers in order to protect the marine environment. Title II contains

[40]Equipment required in the Puget Sound Vessel Traffic System is limited to "a radio telephone that is capable of operation on the navigational bridge of the vessel," 33 C.F.R. § 161.122 (1974). In addition, the Coast Guard requires all vessels over 1,600 DWT operating in navigable waters to be equipped with a radar system, a steering compass, a gyrocompass, a rudder angle indicator, and an echo depth sounding device. 33 C.F.R. Part 164, adopted at 42 Fed. Reg. 5955 (January 31, 1977). None of these equipment requirements are affected by the presence or absence of tug escorts.

no language whatsoever with respect to preemption of state standards. In fact, if anything, the language and structure of Title II contain the inference that state standard setting is permissible. If federal standards are "minimum," there would appear to be nothing to prevent other governmental bodies, such as state legislatures, from establishing standards more stringent than the minimum.[41]

2. **The legislative history of the Ports and Waterways Safety Act reveals no intent to preempt.**

The legislative history of both Title I and II of the PWSA equally fails to reveal an intent to preempt all state regulation of oil pollution hazards.

The genesis of Title I indicates concurrent federal and state regulation was contemplated.[42] Prior to 1972, the Coast Guard's authority to regulate port safety was fragmented. It acted under three separate

[41]The use of "minimum" language in a statute is indeed strong evidence that Congress did not intend to displace state regulation. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 147-148 (1963); *cf., Palladio, Inc. v. Diamond*, 321 F. Supp. 630 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1319 (2nd Cir.), *cert. denied*, 404 U.S. 983 (1971); *A. E. Nettleton Co. v. Diamond*, 27 N.Y.2d 182, 264 N.E.2d 118 (1970), *appeal dismissed sub nom. Reptile Products Association, Inc. v. Diamond*, 401 U.S. 969 (1971) (state statute regulating importation of endangered species upheld when state endangered species list more comprehensive that that established under federal endangered species legislation).

[42]Secretary of Transportation John Volpe, in transmitting to Congress the Administration's bill in a form almost identical to the enacted Title I of the PWSA, stated:

> [W]*e would expect to continue to encourage greater involvement and allocation of resources by state and local port authorities.* Though the regulatory authority of our proposal will assure appropriate federal coordination and general uniformity, *the scope of the port safety task as well as unique local conditions and problems virtually compels local as well as federal effort. PWSA House Hearings* at 4. (emphasis supplied).



grants of authority: the Tank Vessel Act of 1936, ch. 729, 49 Stat. 1889, which gave it authority to issue regulations with respect to vessels carrying "inflammable or combustible cargoes"; the Magnuson Act, 50 U.S.C. § 191 (1970) which authorized the promulgation of rules governing the movement, inspection, and guarding of vessels, harbors, ports and waterfront facilities in the United States upon a determination that our national security was in danger; and the Dangerous Cargo Act, ch. 777 § 1, 54 Stat. 1023 (1940), which provided authority to issue regulations governing the carriage of explosives or dangerous substances, including oil. Significantly, the first two statutes were wholly silent as to preemption, while the third contained a specific waiver of preemption.[43] It thus can scarcely be said that prior to 1972 regulation of the movement of oil in our ports and waterways was recognized by Congress as an exclusively federal function.

The purpose of Title I was simply to place Coast Guard regulation on a more permanent and broader statutory footing, confirming existing Coast Guard authority and extending it to permit the establishment of vessel traffic control systems made possible by newly developed technology. PWSA House Report at 3, 7; PWSA Senate Report at 2791-92. The mere

[43]Section 7(d) of the Dangerous Cargo Act, ch. 777, 54 Stat. 1023 (1940), provided:

> Nothing contained in this section shall be construed as preventing the enforcement of reasonable local regulations now in effect or hereafter adopted, which are not inconsistent or in conflict with this section or the regulations of the Commandant of the Coast Guard established hereunder.

enactment of Title I cannot lead to the conclusion that preemption was intended where it never had existed before. Furthermore, prior to the passage of PWSA, at least ten vessel traffic systems were in operation in various ports and harbors.[44] Several of these were specifically brought to the attention of Congress, including those in Chesapeake Bay, the Delaware River, Los Angeles-Long Beach Harbor, Honolulu and the Saint Mary's River.[45] As recognized by this Court in *New York Department of Social Services v. Dublino*, 413 U.S. 405, 414 (1973), congressional awareness of such systems, coupled with the absence of direct and unambiguous preemptive language, is a very strong indication that Congress did not intend to preempt and thereby abolish existing state and local regulation.[46]

While the legislative history of Title I reflects some concern about the regulation of vessels by state and local authorities, this concern was directed primarily at situations where *conflict* might arise between state and federal legislation, *see, e.g.*, State-

[44]*Hearings on Vessel Traffic Control before Subcommittee on Coast Guard and Navigation of the House Committee on Merchant Marine and Fisheries*, 94th Cong., 1st Sess. 183, ser. 94-39 (1975).

[45]*PWSA House Hearings* at 26, 317-18. *Hearings on the Navigable Waters Safety and Environmental Quality Act before the Senate Committee on Commerce*, 92d Cong., 1st Sess. 137-138. ser. 92-39 (1971). (*"PWSA Senate Hearings"*).

[46]In *Dublino*, the Court, rejecting a claim of preemption, noted that 21 states had welfare work requirements in existence when the Federal Work Incentive Program legislation was enacted:

> *If Congress had intended to preempt state plans and efforts* in such an important dimension of the AFDC program as employment referrals for those on assistance, *such intentions would in all likelihood have been expressed in direct and unambiguous language*. No such expression exists, however * * * * (emphasis supplied).



ment of James Reynolds, President, American Institute of Merchant Shipping, in *Hearings on H.R. 17830, H.R. 18047, H.R. 15710, Before the Subcommittee on Coast Guard, Coast and Geodetic Survey and Navigation of the House Committee on Merchant Marine and Fisheries*, 91st Cong., 2d Sess. 181-182, ser. 91-34 (1970), particularly regarding equipment regulations and safety standards which relate directly to implementation of vessel traffic systems. *See, e.g.*, Testimony of John Reed, Chairman of the National Transportation Safety Board, *PWSA House Hearings* at 348-49 (1971); *see also* Statement of Clayton Peavey, Chief, Central Planning Division, Port of New York Authority, *id.* at 185-86.

Although the House Report's discussion of Section 102(b) at one point states that "state regulation of vessels is not contemplated," the remainder of the Report's discussion of Section 102(b), set in the context of other legislative history, indicates that a narrower reading of Section 102(b) is appropriate. Any preemption, at best, is limited to equipment or standards which may conflict with or are deemed necessary to utilize a vessel traffic system.[47]

[47]The full discussion of Section 102(b) in the House Report is as follows:

> This amendment was suggested since it was felt that H.R. 8140 [the bill which became the PWSA] does not make it absolutely clear that the Coast Guard regulation of vessels preempts state action in this field. The inserted language is a positive statement retaining State jurisdiction over structures and making clear that State regulation of vessels is not contemplated.
>
> Last year in the hearings on H.R. 17830, Subcommittee Counsel asked the Coast Guard [Chief] Counsel whether it was the intention of the Coast Guard that states should prescribe safety equipment standards for vessels. The Coast Guard witness said that it was their intention that higher vessel equipment regulations and standards by States should apply to structures only and not to

The legislative history of Title II of the PWSA is almost wholly silent on the question of preemption. In fact, the issue of preemption was not focused upon during the course of the Senate Commerce Committee's hearings. *See Hearings on S.2074 Before the Senate Commerce Committee*, 92d Cong., 1st Sess.,' ser. 92-39 (1971). It is not mentioned in the Senate Report on the PWSA, and it was not alluded to during either Senate or House consideration of the legislation on the floor. *See* 118 Cong. Rec. 11058-60, 22983-86 (1972).

In sum, neither the language nor the history of the PWSA will support a conclusion that Congress clearly and manifestly intended to preempt the field of regulation of oil tanker pollution. Appellants suggest that the reaction of Senator Warren Magnuson, the Senate sponsor of the PWSA, to the decision of the District Court is precisely in point:

> As the sponsor of that Act [the PWSA] in the Senate, I have made known my disagreement with the decision. I think it is wrong; I feel the Court has simply misread the intent of Congress as contained in the Ports and Waterways Safety Act. The weakness of the decision is highlighted by the complete absence of any analysis of the terms of the Act. The Court's reasoning was simplistic at best. Preemption is not favored in the law. Congress must show a clear intent to

vessels. He agreed that the language of H.R. 17830 was not clear in this regard and that we should put some clarifying language in the section.

Your committee adopted the suggested language since it will make clear the intent mentioned above. PWSA House Report at 15. The Senate Report, for its part, discussing the section which became 102(b), contains no reference to preemption. PWSA Senate Report at 2793.



> preempt before such a finding is made. This court summarily reached its decision on the thinnest of reasoning. I say they are wrong. 121 Cong. Rec. 17575 (daily ed., October 1, 1976).[48]

**C. There Is No Implicit Preemption Of Chapter 125.**

The District Court, rather than finding conflict or express preemption, in essence held Chapter 125 unconstitutional on the basis of implicit preemption. Such a holding was unsupported by authority and is unsupportable based upon the factors generally considered in an implicit preemption analysis.[49]

**1. The regulatory scheme established by the Ports and Waterways Safety Act is not so extensive as to preclude state action.**

The District Court found preemption in part based on its conclusion that the PWSA established a "comprehensive federal scheme" for regulating oil

[48]Senator Magnuson expressed similar views when he submitted a statement to a joint session of the Washington State House and Senate Energy and Transportation Committees, in November, 1975, where he stated:

> I wish I could report that the Ports and Waterways Safety Act has been an unqualified success. It has not. It has only been a limited success, because the power to regulate vessel operations and tanker construction standards has simply not been used by the Coast Guard as we in Congress expected—and as we were promised. The Coast Guard has done an excellent job with the vessel traffic control system established by that Act, and particularly here in Puget Sound. It has not, however, gone beyond that system to require the controls needed.
> *Fortunately, that federal law does not prevent you from enacting regulations over vessel operations here at the state level.* (emphasis supplied.)

[49]The District Court cited no authority for its analytical approach. However, the factors relied upon by other courts to find implicit preemption are: (1) whether the federal scheme is so pervasive that there is no room for state action, (2) whether there is a dominant federal interest in uniform federal regulation so as to preclude enforcement of state laws, and (3) whether the state policies produce a result inconsistent with the objectives of federal legislation. *See, e.g., Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

tankers. (Juris. St., App. C, p. 7a.) However, the extent of the federal scheme established by the PWSA is not sufficient grounds for finding Chapter 125 preempted.[50] The Court has often emphasized that comprehensive statutory schemes, enacted in the exercise of what may be broad federal powers, may nonetheless leave the states with extensive leeway to achieve complementary goals under state legislation. *See, e.g., DeCanas v. Bica*, 424 U.S. 351 (1976); *New York State Department of Social Services v. Dublino*, 413 U.S. 405 (1973). Detailed statutory schemes are necessarily appropriate, quite apart from pre-emptive intent, in most areas of modern life. As the Court stated in *Dublino*, 413 U.S. at 415:

[50]While ARCO argued below that, quite apart from the PWSA, there was a "maze of federal legislation", a "seamless web" which left no room for state action, the patent speciousness of such an argument is borne out by the numerous cases which have upheld state regulation of vessels in the face of claims of federal preemption. Thus, in *Kelly v. Washington*, 302 U.S. 1 (1937), the Court upheld the State's inspection and regulation of tugboats which were either registered, or enrolled and licensed under federal laws. In *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960), the Court upheld Detroit's Smoke Abatement Code, which required structural alterations in vessels, even though those ships met all federal design and equipment requirements. In *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973), the Court upheld the Florida Oil Spill Prevention and Pollution Control Act, which provided for the State's recovery of clean-up costs and imposed strict, no fault liability on vessels entering state waters, even though the Federal Water Quality Management Act established "a pervasive system of federal control over discharges of oil." 411 U.S. at 330. *See also Portland Pipe Line Corp. v. Environmental Improvement Comm'n*, 307 A.2d 1 (Me.), *appeal dismissed*, 414 U.S. 1035 (1973). Each of these cases rests, to some extent, on its own special facts, but each serves to demonstrate the extent to which there is room under the overall federal scheme of oil tanker regulation for local pollution control efforts. *See also* discussion at 25-26, *supra*, of extensive state police power regulation of vessels.



> We reject, to begin with, the contention that pre-emption is to be inferred merely from the comprehensive character of the federal work incentive provisions. The subjects of modern social and regulatory legislation often by their very nature require intricate and complex responses from the Congress, but without Congress necessarily intending its enactment as the exclusive means of meeting the problem. Given the complexity of the matter addressed by Congress in WIN, a detailed statutory scheme was both likely and appropriate, completely apart from any questions of pre-emptive intent. (citations omitted).[51]

The inquiry is whether Congress, having failed to expressly preempt, has created a scheme which leaves no room for state action.

The PWSA is not so comprehensive, in intent or implementation, as to oust the states from a regulatory role in the marine pollution area.[52] Title I does

[51]In the District Court, ARCO relied on two decisions, *Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973), and *Northern States Power Co. v. Minnesota*, 447 F.2d 1143 (8th Cir. 1971), *aff'd mem.*, 405 U.S. 1035 (1972), for the proposition that a comprehensive federal regulatory scheme must necessarily preclude complementary state regulation. However, both cases are limited to rather special circumstances: radiation standards in *Northern States* and air space management in *Burbank*, where there was a history of exclusive federal control and no history of state police power regulation. As such, they have little application to an area such as port and waterway safety, where a state has long been held to have "exceptional scope for the exercise of its regulatory power * * * *" *Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 783 (1945).

[52]In determining whether the federal scheme is so pervasive as to leave no room for state laws, the Court examines what in fact has been federally regulated. As repeated in *DeCanas v. Bica*, 424 U.S. 351, 360 at n.8 (1976):

> Little aid can be derived from the vague and illusory but often repeated formula that Congress 'by occupying the field' has excluded from it all state legislation. *Every Act of Congress occupies*

not contemplate that vessel traffic systems or services will necessarily include all aspects of navigational safety within a particular port or harbor area, nor does it require such systems for all ports. Since Congress contemplated there may be widespread variations from port to port in the specifics of tanker regulation, any comprehensiveness of the federal program is of little relevance. *Cf., Terminal Railroad Association v. Brotherhood of Railroad Trainmen*, 318 U.S. 1, 8 (1943); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 148-49 (1963). The Coast Guard recently agreed that Title I left room for supplemental state regulation, specifically stating that states could require tug escorts to address particular local risks.[53]

The PWSA was the result of a deliberate effort by Congress to carefully define the scope of the Coast Guard's authority, including the types of waters in which it could establish vessel traffic systems, the elements of such a system, and the manner in which direct vessel movement would be controlled. In explaining Title I, and how it had been modified in response to extensive criticism of a prior port safety bill, Coast Guard Admiral Bender characterized the language of the PWSA as:

*some field, but we must know the boundaries of that field before we can say that it has precluded a state from the exercise of any power* reserved to it by the Constitution * * * * *Hines v. Davidowitz*, 312 U.S. 52, 78-79 (1941) (Stone, J., dissenting) (emphasis supplied.)

[53]Coast Guard Response to Questions asked of Admiral Siler by Senator Magnuson, *Hearings on Recent Tanker Accidents, before the Senate Commerce Committee*, 95th Cong., 1st Sess. 412, 463, ser. 95-4 (1977). A more complete discussion of the Coast Guard response is contained at 62-63, *infra*.



> [C]arefully limiting the scope of the authority granted and more precisely defining the activities and regulations so authorized. *PWSA House Hearings* at 21.[54]

The primary regulatory objective of TitIe I was the authorization of the Coast Guard to establish vessel traffic systems in "waters subject to congested vessel traffic" and to require the "installation of electronic or other devices necessary" to use that system. Sections 101 (1 and 2). While other regulatory measures were authorized, *see, e.g.*, Sections 101(3), (4) and (5), it was understood that any direct control of vessel movement by the Coast Guard would be done only in limited circumstances:

> Mr. Clark. *To what degree and under what circumstances would the Coast Guard employ firm control of traffic?*
> Admiral Bender. There are many degrees of control that might be employed, Mr. Chairman. *First would be the simple matter of regulation*, such as for example, *establishing one-way channels, or the speed in the channel, but as for the direct control of traffic*, while it is engaged in its movement we would generally rely upon advice, and *only issue direct orders to the master or to the pilot under circumstances of extreme emergency.* * * * *
> *We do not see the extent of traffic control that the Federal Aviation Administration requires*

[54]In 1970, the Administration introduced in Congress H.R. 17830, which would have provided very broad authority to prescribe marine traffic control procedures. In 10 days of hearings, the bill was heavily criticized as "loosely drawn and * * * both vague and exceedingly broad in its scope." PWSA House Report at 4; *PWSA House Hearings* at 1. The bill was not enacted. *See also* comparison of changes between H.R. 17830 and H.R. 8140. *PWSA House Hearings* at 27-28.

*either on airways or at the airport.* PWSA House Report at 8-9. (emphasis supplied.)

Thus, Title I does not contemplate that a vessel traffic system, even if established for a port, will necessarily include all aspects of vessel regulation. What in practice are the operative provisions of Chapter 125, i.e., tug escorts and the access limit, are barely addressed in the PWSA, let alone in a comprehensive manner. For example, the legislative history of the PWSA contains no discussion of tug escorts. To the extent the PWSA authorizes the Coast Guard to consider tugs or access limits, that authority is contained in Sections 101(3)(iii) and (iv), which refer respectively to "establishing vessel size and speed limitations and vessel operating conditions" and "restricting vessel operation." These Coast Guard powers, however, relate primarily to the operation of vessel traffic control systems.[55] Moreover, they may be limited by the preambular language of 101(3) to areas which are "especially hazardous" or to temporary hazardous conditions, such as those which might be caused by adverse weather or reduced visibility.

The District Court apparently concluded mere enactment of the PWSA preempted state authority.[56] As discussed at pages 33-34, *supra*, such a view ignores the statutory language recognizing existing state and local traffic systems. *See, e.g.*, Sections

[55]PWSA Senate Report at 2791-92.

[56]The District Court concluded that since the PWSA granted the Coast Guard the *authority* to require tugs and exclude tankers, these provisions in Chapter 125 were thereby preempted. (Juris. Stat., App. C, pp. 7a-8a.)



102(c) and (e). Furthermore, the District Court's conclusion that the "comprehensive federal scheme" preempted "the field" (Juris. Stat., App. C, p. 7a) overlooks the fact that Title I does not require the Coast Guard to take any action in any port. Section 101 provides the Coast Guard *may* establish vessel traffic systems. Given the clear congressional objective of protecting marine environments from vessel pollution, it is unlikely Congress intended enactment of the PWSA to preclude states from protecting their waters, even "congested" or "hazardous" areas, while leaving it to the Coast Guard in its discretion to decide, for whatever reasons, whether or not to exercise the powers granted it.[57]

The implementation of Title I also leaves room for state regulatory activity. In the case of Puget Sound, although the Coast Guard Vessel Traffic System establishes a general routing and reporting system, that system is scarcely all-encompassing. For example, while its traffic lanes keep vessels separated, the system does not purport to address other problems of tanker movement, such as lack of maneuverability and loss of power—problems addressed by Chapter 125.[58]

[57]In determining preemptive intent, the Court may consider the distinction between a duty imposed and an action permitted. *See, e.g., H. P. Welch Co. v. New Hampshire*, 306 U.S. 79, 84-85 (1939):

> In view of the effort of governmental authorities everywhere to mitigate the destruction of life, limb and property resulting from the use of motor vehicles, *it cannot be inferred that Congress intended to supersede any state safety measure prior to the taking effect of a federal measure found suitable to put in its place.*

*See also Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 765-66 (1945).

[58]While the Coast Guard has published an Advance Notice of Proposed Rulemaking, 41 Fed. Reg. 18770 (May 6, 1976), indicating

The Coast Guard has neither proposed nor adopted regulations establishing general access limits for Puget Sound. Indeed, the subjects of tug escort requirements and access limits were never considered by the Coast Guard when it established the Puget Sound VTS. *See generally* Notice of Proposed Rulemaking, Puget Sound Vessel Traffic System, 38 Fed. Reg. 21227 (August 6, 1973); Final Rules and Regulations for Vessel Traffic Systems in Puget Sound, 33 C.F.R. Part 161 (1974). Not a single person who testified on or submitted comments with regard to the proposed Vessel Traffic System rules suggested that tug escort or vessel access limits be established—they were simply outside the scope of the rulemaking. *See generally* Public Docket, CGD 73-158 PH, Coast Guard Headquarters, Washington, D.C. 20590.

It is equally clear that the design and construction standards authorized and adopted under Title II are not comprehensive in the sense of precluding all state efforts to protect their waters.[59] Certainly,

that it is considering the possibility of proposing general regulations for tug escorts, it has not actually proposed, let alone adopted, such regulations.

[59]The regulations adopted to date by the Coast Guard under the PWSA, and the new tanker safety initiatives announced by President Carter on March 18, 1977, leave room for state action. Regulations currently in effect under Title II of the PWSA have been recognized by the Coast Guard itself as "not a complete and comprehensive answer" to the tanker pollution problem. United States Coast Guard, *Final Environmental Impact Statement on Regulations for Tank Vessels Engaged in the Carriage of Oil in Domestic Trade* at 1 (August 15, 1975) ("CG EIS," Ex. X., A. 207). They have, moreover, primarily been directed at the reduction of *operational pollution*, *CG EIS* at 1, 2, 6, 6a, 60e, 60f (A. 212-213, 219-220, 286) whereas the



there is nothing in the PWSA, no matter how comprehensive its intent, which would make it inappropriate for a state to specify optional design and equipment features, which features are deemed equivalent to tug escorts in providing protection to a unique marine environment. Yet this is all that Chapter 125 does.

In sum, the field is left open for state action to supplement federal requirements in order to protect local marine environments and the jobs and industries dependent on their natural resources. *Cf.*, *Parker v. Brown*, 317 U.S. 341 (1943); *H. P. Welch Co. v. New Hampshire*, 306 U.S. 79 (1939).[60]

2. **Tanker regulation does not require uniform national implementation.**

To the extent the District Court found preemption based on a need for uniformity, the Court was speaking primarily of vessel design and con-

thrust of Chapter 125 is to reduce *accidental* pollution risks. The Presidential initiatives would go substantially beyond existing Coast Guard requirements in establishing new design, equipment, construction and manning requirements. Statement of Brock Adams at *Hearings on S.182 et al. before the Senate Committee on Commerce, Science and Transportation*, 95th Cong., 1st Sess. (March 18, 1977) ("Adams Statement"). However, there is much that they leave untouched. The Presidential initiatives contain nothing with respect to access limits on traffic in sensitive or hazardous environments, the need for tug assistance, or the use of pilots, all integral elements of Chapter 125.

[60]To the extent that a case such as *Napier v. Atlantic Coast R.R. Line*, 272 U.S. 605 (1926), stands for any different proposition, it simply no longer represents the law. Its basic holding that unimplemented federal power is still preemptive has been completely eroded. *See, e.g., Terminal R.R. Ass'n v. Brotherhood of Railroad Trainmen*, 318 U.S. 1 (1943). *Napier's* emphasis on the scope of federal regulation alone as the dispositive criterion in preemption cases cannot be squared with later cases. *E.g., Florida Lime & Avocado Growers, Inc., supra.*

struction standards which the Coast Guard promulgates under Title II of the PWSA. However, the protection of marine environments, such as Puget Sound, from the risks of oil tanker pollution does not inherently require exclusive national supervision.[61]

The District Court's conclusion that Title II mandates uniform design and equipment standards is incorrect for several reasons. First, the language of Title II itself, calling for "minimum standards" by the Coast Guard, negates any conclusion the PWSA requires exclusive national control to achieve uniformity. Second, the District Court ignored the fact that tankers on Puget Sound have complied with Chapter 125 since its effective date without any design or equipment modifications, and failed to discuss how Washington's optional design features, as *alternatives* to tug escorts, can interfere with any purported need for uniformity of design and equipment standards. Third, design and equipment standards may vary as a function of local conditions. Consistent with the "systems approach" mandated by Title II of the PWSA, PWSA Senate Report at 2773, the Coast Guard acknowledges that particular design and construction features may depend upon such factors as the environment and the geographic location in which a ship is operating. For example, with respect to maneuverability features such as twin

[61] Far from requiring uniform regulation, protection of local waters demands diverse responses. *See generally* cases cited at p. 26, fn. 30, *supra*.



screws, the Coast Guard has stressed that the effectiveness of such features in improving tanker "controllability" may depend upon "the environment in which the specific ship is operating" and "the constraints imposed by the geographic location within which the ship is operating." *CG EIS* at 64. (A. 293.) In other words, in certain environments, specified maneuverability features may make substantial sense, even if not mandated on a national basis.

Tug escorts and access limits, as with design and equipment standards, do not require national uniformity. The PWSA, as well as Coast Guard implementation thereof, recognize that a diversity of local conditions may call for a diversity of appropriate solutions. Title I of the PWSA is specifically adapted to the promulgation of different regulations for each port. Thus, Section 102(e) provides:

> *In determining the need for, and the substance of, any rule* or regulation or the exercise of other authority hereunder, the *Secretary shall*, among other things, *consider* * * *
> (1) *the scope and degree of hazards;*
> (2) vessel traffic characteristics * * *;
> (3) *port and waterway configurations and the differences in geographic, climatic, and other conditions and circumstances;*
> (4) *environmental factors;*
> (5) economic impacts and effects;
> (6) existing vessel traffic control systems, services and schemes; and
> (7) *local practices and customs* * * * *
> (emphasis supplied).

Both the Senate and House Reports on the PWSA emphasize the port by port approach mandated by

the Act, taking into account varying local environmental hazards. PWSA Senate Report at 2791-92; PWSA House Report at 8.

Chapter 125 responds to local conditions. Tug escorts supplement maneuverability of oil tankers between 40,000 and 125,000 DWT, in response to natural conditions in Puget Sound such as the depth and width of channels, location of islands and other navigational hazards, tidal currents, prevailing fog and visibility conditions and prevailing winds. (A. 69.)

The access limit on oil tankers greater than 125,000 DWT also responds to natural conditions. Five of the six refineries adjacent to Puget Sound cannot handle a tanker as large as 125,000 DWT. Each has a controlling dockside depth of 45′ or less, and a 120,000 DWT tanker has a 52′ draft. Although ARCO can receive tankers greater than 125,000 DWT, ARCO is also restricted by a dockside depth of approximately 55′.[62] Further, along the tanker's route through the San Juan Islands, the depth in places is only 60 feet. (A. 65.)

The absence of a need for exclusive federal control over access limits is demonstrated by the Deepwater Port Act of 1974, 33 U.S.C. §§ 1501 *et seq.*, which establishes a federal scheme for the licensing of offshore terminals for supertankers beyond the existing territorial jurisdiction of the states. The

[62]The largest tanker to call at ARCO's refinery was 138,000 DWT. (A. 113.)



Act specifically vests in adjacent states an absolute veto over port proposals, 33 U.S.C. §§ 1503(c)(9) and 1508(b), thereby reflecting a congressional judgment that individual states should have final authority over supertanker use off their coasts.[63] It is highly unlikely that Congress intended that the State of Washington could exclude supertankers at offshore ports but not do so in inland waters where the dangers of transportation are greater, as are the environmental values to be preserved.

Thus, given the wide variance in local environmental needs and sensitivities, there is no inherent reason to have exclusive federal control and thus no grounds to infer preemption. Where, as here, the congressional objective of reducing the risk of economic and environmental damage caused by oil spills

[63]Contrary to the suggestion of ARCO below, states were given this authority to protect the marine environment from oil spills, as well as to control landside impacts. The congressional judgment is well expressed in the Senate Report on the Act, which states:

> The Committees believe that *such provisions [the state veto provision] are necessary to protect the interests of coastal states* in the deepwater port development process.
> *States and localities will ultimately experience economic and environmental impacts* as a result of deepwater port development.
> * * *
> The Committees believe that *any coastal State which chooses* to forego benefits associated with deepwater ports *to avoid potentially adverse environmental impacts should be allowed to veto the issuance of a license for deepwater port* development off its shores. The Deepwater Port Act of 1974 creates this explicit veto power in section 4(c)(9) and section 9(b) because a state would not otherwise have such authority over a Federal license. *Joint Report on S.4076 of the Senate Committees on Commerce, Interior and Insular Affairs and Public Works*, S. Rep. No. 93-1217, 93rd Cong., 2d Sess. 10. (October 2, 1974). (emphasis added).

State power has in fact been recognized in implementation of the Act as extending to the design, construction, equipment and operation of supertankers. See stipulation of settlement and voluntary dismissal dated January 14, 1977, in *Askew v. Coleman*, civil action No. 76-2005 (D.D.C., filed October 28, 1976).

is furthered by the exercise of traditional state police powers supplementing federal programs operating in related but distinct areas, a preemptive intent cannot be reasonably found.[64]

### 3. Chapter 125 is consistent with the Ports and Waterways Safety Act and overall federal policy for protection of the marine and coastal environment.

The District Court characterized the PWSA as not "inviting" state participation in its regulatory scheme (Juris. Stat., App. C, pp. 9a-10a.), and ARCO argued below that any state regulation would interfere with the balance which must be struck by the Coast Guard in implementing the PWSA. However, an examination of (a) the goals of Chapter 125 and the PWSA, (b) the effect of implementation of Chapter 125 on the accomplishment, both nationally and internationally, of the goals of the PWSA, and (c) the necessity of interpreting the PWSA consistently with overall federal policy for protection of the marine and coastal environment, serves to demonstrate that Chapter 125 is fully compatible with, and indeed helps achieve, the objectives of the federal legislation.

[64]This judgment has been well expressed by Chief Judge Lumbard of the Second Circuit in *Chrysler Corp. v. Tofany*, 419 F.2d 499, 511 (2d Cir. 1969):

> We have already stated that the express purpose of the federal statute before us is the reduction of traffic accidents. Uniformity through national standards is of course desirable, but in these cases it is truly a secondary objective. * * * * If traffic safety is furthered by a traditional type of state regulation under the police power, as we feel that it is here, a narrow construction of the preemptive effect of the federal Act and Standard No. 108 is required.



#### a. The goals of state and federal laws are consistent.

The full purpose and objectives of the PWSA are to prevent maritime damage and "to protect the navigable waters and the resources therein from environmental harm resulting from vessel or structure damage, destruction or loss." Section 101.[65] Chapter 125 seeks to achieve like goals. Its essential purpose is "to decrease the likelihood of oil spills on Puget Sound and its shorelines." Chapter 125, Section 1 (Wash. Rev. Code § 88.16.170).

Obviously, there is "overlap," as the District Court indicated (Juris. Stat., App. C, pp. 10a-11a.), between the purposes of Chapter 125 and those of the PWSA. Such overlap, however, is emphatically not grounds for inferring a preemptive intent and upsetting state police power regulation. The Court has consistently upheld state laws where their purposes have been parallel to, complementary with, or in furtherance of the goals of the federal act by which it is claimed they are preempted. *See, e.g., Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963); *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974); *Goldstein v. California*, 412 U.S. 546 (1973); *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973).

As the Court stated in *New York State Depart-*

[65]In addition to the general goals of the PWSA enunciated in Title I, Title II is intended to achieve the improvement of "existing standards for the design, construction, alteration, repair, maintenance and operation of [certain bulk cargo vessels, including oil tankers] for the adequate protection of the marine environment." Section 201(1).

*ment of Social Services v. Dublino*, 413 U.S. 405, 419 (1973):

> It would be incongruous for Congress on the one hand to promote [a given goal] * * * and on the other to prevent States from undertaking supplementary efforts toward this very same end.

b. **Chapter 125 does not impede the enforcement or accomplishment of the objectives of the Ports and Waterways Safety Act.**

Not only are the purposes of Chapter 125 and the PWSA consistent, but it is also clear that, contrary to the claims of ARCO below, Chapter 125 does not upset any delicate "balancing of competing interests" which must be made under the PWSA before regulations are issued, nor does it interfere with any goal of encouraging international agreement.

ARCO below sought to analogize the decision-making process under the PWSA to that created by the Federal Aviation Act, 49 U.S.C. §§ 1301, *et seq.*, and the Atomic Energy Act, 42 U.S.C. §§ 2051, *et seq.*, federal regulatory schemes in which it was held in *Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973), and *Northern States Power Co. v. Minnesota*, 447 F.2d 1143 (8th Cir. 1971), *aff'd mem.*, 405 U.S. 1035 (1972), that a federal balancing of competing factors excluded state regulation. The statutory scheme at issue here is significantly different. Whereas the Administrator of the Federal Aviation Administration and the Commissioners of the



Atomic Energy Commission were charged with the dual functions of both regulating *and* promoting an industry, thereby making balancing of commercial and safety factors the essence of the decision-making process, the Secretary of Transportation is charged under the PWSA solely with regulatory functions. A fundamental purpose of the PWSA is to provide for environmental protection. Economic and commercial considerations, although relevant, *see* Sections 102 (e)(5), 201(4), are incidental to the accomplishment of the basic purposes of the statute. *See, e.g.*, PWSA Senate Report at 2777. The requirements of Chapter 125 cannot be interpreted as "interfering" with any "delicate balance" established under the PWSA. Rather, with a parallel goal of environmental protection, its implementation helps to fulfill the PWSA's general objectives.

It is equally clear that the specific provisions of Chapter 125 do not upset the administration of the PWSA. In the District Court, ARCO did not seriously contend that tug escorts impeded the accomplishment of PWSA purposes. The exclusion of supertankers from Puget Sound is consistent with the intent of Congress that vessel size limitations not be imposed universally, but only be established on a port by port basis, based on a consideration of local needs. PWSA Senate Report at 2792. Indeed, this is precisely what the State of Washington has done.[66]

---

[66]The findings of Chapter 125 are explicit in this regard:

> The legislature further recognizes that certain areas of Puget Sound and adjacent waters have limited space for maneuvering a

Furthermore, this action is fully compatible with and indeed contemplated by the state veto over supertanker use embodied in the Deepwater Port Act of 1974, 33 U.S.C. §§ 1503(c)(9), 1508(b). Indeed it is in furtherance of the environmental purpose of the Deepwater Port Act that, because of the risk of major spills, supertankers should be utilized at *offshore* ports, away from sensitive areas such as Puget Sound.[66a] Joint Report of the Senate Committee on Commerce, Interior and Insular Affairs and Public Works on S.4076, S. Rep. No. 93-1217, 93rd Cong., 2d Sess. 101 (October 2, 1974).

Chapter 125 also does not interfere with the PWSA's goal of encouraging development of desirable international design standards for vessels. See PWSA Senate Report at 2783, 2788. It cannot be emphasized strongly enough that Chapter 125 does not involve the "unilateral imposition" of design standards on any vessels, including foreign flag tankers. Foreign flag tankers smaller than 125,000 DWT tons, regardless of their design or equipment, are perfectly free to trade in Puget Sound, and have done so, if they take state pilots and tug escorts. Pilotage and tug escort requirements have always been considered a local prerogative and are not the subject of international accord. Finally, the exclu-

large oil tanker and that these waters contain many natural navigational obstacles as well as a high density of commercial and pleasure boat traffic. Chapter 125, Section 1 (Wash. Rev. Code § 88.16.170).

[66a]The committees specifically noted that the West Coast states had expressed the belief that Alaskan oil should be unloaded at offshore deepwater ports.



sion of supertankers from Puget Sound is unrelated to design, construction, and equipment requirements of the sort embodied in international agreements and thus in no way impinges on U.S. efforts to promote the adoption of such agreements.[67]

c. **The Ports and Waterways Safety Act must be interpreted consistently with overall federal policy for protection of the marine and coastal environment.**

Chaper 125 and the PWSA must be set in the context of the overall federal approach to the protection of marine and coastal resources. Other federal statutes, including the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1251 *et seq.*, the Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451 *et seq.*, and the Deepwater Port Act of 1974, 33 U.S.C. §§ 1501 *et seq.*, expressly

[67]Even if Chapter 125 were deemed related in some obscure way to the process of achieving international agreement, it must be remembered that the primary thrust of the PWSA is to protect the domestic marine environment by all appropriate means. The PWSA does not commit the United States to an exclusive international regime. Rather, the Senate Commerce Committee, in its Report on the PWSA, made it clear that environmental protection should not be "sacrificed" on the principle of international regulation. PWSA Senate Report at 2783, 2788. In announcing hi initiatives on March 18, 1977, President Carter reaffirmed the appropriateness of unilaterally moving ahead of the international community to establish environmentally sound vessel source pollution standards. *See* Adams statement. In so doing, he implicitly rejected the rationale, often expressed by the Coast Guard in the past, *see* CG EIS at 4-8 (A. 216-222), that it was necessary to defer to international standards in order to jeopardize ratification of international agreements or risk other adverse international repercussions. In such circumstances, Chapter 125 cannot realistically be regarded as inteffering with any federal policy of deference to international forums.

preserve state authority to address sources of water and coastal pollution.[68]

The District Court acknowledged these statutes to be part of the congressional policy of "cooperative federalism" in environmental regulation, and recognized state involvement "in virtually all of [Congress'] water-related regulatory programs." (Juris. Stat., App. C, p. 9a). However, the District Court concluded that since these statutes "explicitly invited state participation," while the PWSA had no express invitation, Congress did not intend to share any regulatory authority over oil tankers and attendant pollution risks. (Juris. Stat., App. C, pp 9a-10a.) The Court in effect reversed the established requirement that state police powers are preempted only where Congress clearly and manifestly intends such a result. The District Court suggested states are preempted unless Congress invites state action. Furthermore, the District Court ignored the teaching of this Court that, absent a clear expression of congressional intent to preempt, the proper approach is to strive

[68]The Court, in *DeCanas v. Bica*, 424 U.S. 351 (1976), recognized the importance of examining other federal statutes to determine congressional intent with regard to preemption. The Court found no intent to preempt California's alien employment law based on the scope and detail of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 *et seq.* The Court found evidence in other federal legislation, i.e., the Farm Labor Contractor Registration Act, 7 U.S.C. § 2041, *et seq.*, that Congress intended that states could, consistent with federal law, regulate employment of illegal aliens. The Farm Labor Act expressly reserved state authority to supplement federal action, although it did not cover all activities covered by the California statute. Nevertheless, the Court found this related federal legislation was "persuasive evidence that the INA should not be taken as legislation by Congress expressing its judgment to have uniform federal regulations * * * *" 424 U.S. at 362.



to the fullest extent possible to hold the federal and state regulatory efforts in harmony. *See, e.g., Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 444 U.S. 117, 127 (1973).

The fundamental national policy stated in the Federal Water Pollution Control Act Amendments of 1972, is "to recognize, preserve and protect the primary responsibilities of the states to prevent, reduce and eliminate pollution * * * *" 33 U.S.C. § 1251(b). The Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451 *et seq.*, which established a program of federal grants to coastal states for developing coastal zone management programs, is based in part upon the finding that,

> The key to more effective protection and use of the land and water resources of the coastal zone is to encourage the States to exercise their full authority over the land and waters in the coastal zone * * * * 16 U.S.C. § 1451(h).[69]

The Estuarine Areas Act of 1968, 16 U.S.C. §§ 1221 *et seq.*, provides:

> [I]t is declared to be the policy of Congress to recognize, preserve and protect the responsibilities of the States in protecting, con-

[69]The Coastal Zone Management Act encourages implementation of zoning-type controls to govern the use of land and water resources comprising the coastal zone, which includes Puget Sound. State management programs establishing controls must consider, *inter alia*, economic development. This economic development, including "transportation and navigation," was found to place increasing and competing demands upon the land and waters of the coastal zone. 16 U.S.C. § 1451(c). On June 1, 1976, the Secretary of Commerce approved Washington State's management program for regulation of uses within the state's coastal zone (A. 343). This management program includes all state statutes applicable to the coastal zone, including Chapter 125. With this federal approval all federal programs must be consistent with the state program. 16 U.S.C. § 1456(c).

> serving, and restoring the estuaries of the United States. 16 U.S.C. § 1221.

The Deepwater Port Act of 1974, 33 U.S.C. §§ 1501 *et seq.*, which provides for federal licensing of offshore ports for supertankers, declares that its purposes are, *inter alia*, to:

> (3) protect the interests of the United States and those of adjacent coastal States in the location, construction, and operation of deepwater ports; and (4) protect the rights and responsibilities of States and communities to regulate growth, determine land use, and otherwise protect the environment in accordance with law. 33 U.S.C. §§ 1501(a)(3) and (4).

It is difficult to perceive that the same Congress which passed the Federal Water Pollution Control Act and the Coastal Zone Management Act could have intended a complete erasure of state and local authority over one of the prime potential sources of marine and coastal pollution. Passage of the Deepwater Port Act[70] two years later further reinforces the dominent role of states in the regulation of oil transportation and delivery in and adjacent to their marine waters.[70]

Indeed, the Coast Guard itself has advised Congress that, in the absence of conflict, state action on tanker safety is not a hindrance to federal regulatory efforts under the PWSA. *See* Coast Guard response to questions asked of Admiral Siler by Senator Magnuson, *Hearings on Recent Tanker*

[70]Subsequent, as well as contemporaneous, legislation may be used to determine congressional purpose. *See, e.g., Great Northern Railway Co. v. United States*, 315 U.S. 262 (1942).



*Accidents Before the Senate Commerce Committee*, 95th Cong., 1st Sess. 412-64, ser. 95-4 (1977). After noting that states have traditionally and legitimately required that vessels in foreign trade employ pilots familiar with local waters and environmental conditions, the Coast Guard went on to indicate that other state standards which did not "contradict" existing federal and international requirements were acceptable, specifically stating:

> *If the state wished* to add on to the existing federal standard, rather than to conflict with it, say *to require the use of tugs* to address some particular local risks, and if that standard did not impede innocent passage, then the Coast Guard would support that action.

*Id.* at 463. (emphasis supplied).

The Coast Guard's own statements thus belie any claim that Chapter 125 is preempted as incompatible with the federal regulatory role under the PWSA.

The District Court, accepting the arguments of ARCO in reference to design and construction standards, stated, "Balkanization of regulatory authority over this most interstate, even international, of transportation systems is foreclosed by the national policy embodied in the PWSA." (Juris. Stat., App. C, p. 8a.) Appellants do not believe that this case has anything to do with mandatory design standards. But in any event to view state standard setting as "Balkanization," with all its negative connotations, reflects a mistaken perspective of the proper relationship between state and federal governments in this area. Appellants suggest that Chapter 125 ought

more properly to be viewed as providing a needed and diverse solution to a difficult environmental problem —the kind of creative action which is vital to a healthy federal system. As Mr. Justice Brandeis stated in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932):

> It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

Chapter 125, a statute which in no way interferes with federal pollution control efforts, is precisely the kind of progressive state action which should be upheld and encouraged.

## II. CHAPTER 125 DOES NOT CONFLICT WITH THE CERTIFICATION AND PERMIT PROVISIONS OF THE TANK VESSEL ACT, WITH FEDERAL VESSEL REGISTRATION, ENROLLMENT AND LICENSING LAWS, OR WITH THE MERCHANT MARINE ACT OF 1970 AND THE FEDERAL MARITIME ADMINISTRATION'S TANKER CONSTRUCTION PROGRAM.

In the District Court, ARCO argued that, although actual conflict in the sense of impossibility of dual compliance did not exist, Chapter 125 nonetheless interfered with the administration and obstructed the realization of the goals of a number of federal enactments, including the certification and permit provisions of the Tank Vessel Act of 1936,



federal vessel registration, enrollment and licensing laws, and the Merchant Marine Act of 1936, as amended in 1970 and the Federal Maritime Administration's tanker construction program.[71] The District Court did not reach the conflict issue, except as regards Chapter 125's provisions for state-licensed pilots on "enrolled vessels."[72] If it had, it would have found ARCO's claims without merit.

### A. Chapter 125 Does Not Conflict With Federal Certification And Licensing Of Oil Tankers.

Oil tankers subject to Chapter 125 must obtain federal certificates under the Tank Vessel Act, as amended, 46 U.S.C. § 391a, in order to engage in the transportation of oil, and all United States flag vessels over 20 tons must have federal licenses in order to engage in commerce. The certificates and licenses held by oil tankers do not, however, represent an affirmative and absolute grant of authority to engage in the transport of oil at all times and in all places. Certificates obtained by oil tankers under Section 201(6) of the PWSA, for example, merely indicate that the vessel is in compliance with the rules and regulations promulgated thereunder. Likewise, licenses which may be granted to engage in coastwise trade, *see* 46 U.S.C. §§ 251-335, are basically issued as a registration device, designed to insure that only certain vessels, *i.e.*, U.S. flag vessels, may engage in trade between U.S. ports. It is clear, in any event,

[71] ARCO claimed that Chapter 125 was invalid under the authority of *Perez v. Campbell*, 402 U.S. 637 (1971).

[72] See discussion at p. 10, n. 9, *supra*.

that federal certification and licensing does not preclude the State of Washington either from acting in the area of tug escort and alternative design features, or from excluding supertankers from certain parts of the State's waters.

Insofar as Chapter 125's alternative tug escort and design provisions are concerned, these provisions in no way affect the ability of ARCO to utilize federally certificated or federally licensed tankers to carry oil to Puget Sound. Indeed, ARCO has been complying with Chapter 125 since it became effective. Numerous vessels have carried oil to the Cherry Point refinery in that time.[73] In any case, the Court has rejected the contention that the licensing and enrolling of vessels by the federal government gives them a "dominant federal right to use the navigable waters of the United States, free from the local impediment that would be imposed by * * * [a local] ordinance." *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 440-47 (1960). As the Court stated at 447:

> The mere possession of a federal license * * * does not immunize a ship from the operation of the normal incidents of local police power, not constituting a direct regulation of commerce.

*See also Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 141-42 (1963) (federally licensed commerce not immunized from "more demanding state regulations.")

[73]All six oil companies operating refineries on Puget Sound in fact presently supply such refineries using federally licensed and certified tankers.



Similarly, insofar as the exclusion of supertankers from Puget Sound is concerned, this exclusion, which involves not the whole State but only one particular area of high environmental sensitivity,[74] is not only consistent with the general federal policy of the Deepwater Port Act of 1974, discussed at pages 52 to 53, *supra*, but simply represents the exercise of a traditional state power to refuse entry, for safety's sake, to a vessel whose operation in state ports and waterways is hazardous.[75] Thus, the Court

[74]There are other areas within the State where supertankers might be accommodated. The Northern Tier Pipeline Company has announced plans to construct an oil receiving terminal at Port Angeles, Washington, capable of receiving tankers in excess of 125,000 DWT. (A. 51.) Such a terminal would not be subject to Chapter 125. Additionally, the Oceanographic Commission of Washington reported in January 1975 on three sites located west of Puget Sound within the State of Washington (and therefore not subject to Chapter 125) which are considered reasonably developable as port sites capable of receiving tankers in excess of 125,000 DWT. (A. 75.)

[75]The cases relied on below by ARCO for the proposition that a state may not exclude federally licensed vessels from its waters do not support its argument. *Toye Brothers Yellow Cab Co. v. Irby*, 437 F.2d 806 (5th Cir. 1971), was an economic discrimination and Commerce Clause case in which the Court found that the local authority had "no justifiable local interest" in excluding federally licensed carriers. In *Castle v. Hayes Freight Lines, Inc.*, 348 U.S. 61 (1954), the Court simply held that a state's exclusion of a federally licensed carrier from its highways for violating weight limitations was inappropriate when there were conventional forms of punishment available which would accomplish the same purpose. In *Sperry v. Florida*, 373 U.S. 379 (1963), the State of Florida sought to bar an individual who had been granted the right to practice before the Federal Patent Office from engaging in such practice on the grounds that it constituted the unauthorized practice of law. The federal authority specifically granted an unqualified authorization to perform a very narrow function, *viz.*, practice before the Patent Office. Finally, *Gibbons v. Ogden*, 22 U.S. 1 (1824) involved an express license to

stated in *Kelly v. Washington*, 302 U.S. 1, 14 (1973):

> When the State is seeking to prevent the operation of unsafe and unseaworthy vessels in going to and from its ports, it is exercising a protective power akin to that which enables the State to exclude diseased persons, animals and plants. These are not proper subjects of commerce, and an unsafe and unseaworthy vessel is not a proper instrumentality of commerce.

In this case, the State of Washington has made the judgment that operation of supertankers in Puget Sound is "unsafe" and has properly sought to protect itself against their use. Such limited health or safety-related exclusions have been consistently upheld. *See, e.g., Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963) (upholding California regulation excluding federally certified avocados measuring less than 8% oil content); *cf., Portland Pipe Line Corp. v. Environmental Improvement Commission*, 307 A.2d 1 (Me.), *appeal dismissed*, 414 U.S. 1035 (1973) (upholding the Maine Coastal Conveyance Act which, *inter alia*, authorized the Maine Environmental Improvement Commission to restrict oil tanker operation in sensitive coastal waters).[76]

engage in interstate business between two points, which was abridged by state economic discriminatory action. Not one of these cases holds that the grant of a general federal license, by itself, immunizes the licensee from a limited exclusionary effect of state police power regulations.

[76]It should additionally be noted that what Washington State has done directly in Chapter 125 is no different from what it, and every state, can accomplish *de facto* through its power to regulate land use in harbor areas, approve docking facilities, and authorize dredging in ports and harbors. Every port and harbor is unique, with its own draft limitations and specific hazardous conditions. If the state prohibits, as it validly may, the construction of a docking facility for the supertankers or the dredging of deeper channels, they are effectively excluded. State of Washington Shoreline Management Act, Wash. Rev. Code ch. 90.58. The State of Washington has exercised analogous power to achieve proper state goals.



**B. Chapter 125 Is Not In Conflict With The Merchant Marine Act of 1970.**

ARCO argued to the District Court that the exclusion of supertankers from Puget Sound conflicts with the Merchant Marine Act of 1970, as amended, 46 U.S.C. §§ 1101 *et seq.*, and the Federal Maritime Administration's tanker construction subsidy program implementing that Act. The thrust of its argument was that the Merchant Marine Act of 1970 and the tanker construction program establish a federal policy of encouraging and supporting the construction of supertankers, and that the exclusion of tankers larger than 125,000 DWT "discourages the construction of large tankers," and "threatens the success of the federal program." Such an argument is without basis in law or fact.[77]

*First*, although there are specific references in the legislative history of the Merchant Marine Act of 1970 to the need to "produce ships of high productivity" and of increased "lift capacity," there is nowhere in the legislative history a specific reference to the need to construct "supertankers." *See generally* S. Rep. No. 91-1080, 91st Cong., 2nd Sess. (1970); 116 Cong. Rec. 16588-615 (1970) (House Debate);

[77]As discussed at 52, *supra*, the exclusion of supertankers from Puget Sound is primarily the result of natural geographic conditions, rather than Chapter 125.

116 Cong. Rec. 32487-512 (1970) (Senate Debate). In fact, the program is a broad-based one designed generally to "modernize" the U.S. fleet and is not aimed exclusively at oil tankers.[78]

*Second*, and more importantly, the tanker construction program, insofar as it has sought to encourage supertanker construction as part of a "balanced fleet,"[79] has been and is integrally related to a program to develop new, *offshore* port facilities specifically to accommodate supertankers which cannot be accommodated in existing ports. *See* Federal Maritime Administration, *Final Environmental Impact Statement on Tanker Construction Program* II-3, IV-63, IV-102 (N.T.I.S. Report No. EIS 730725-F, May 30, 1973). The Maritime Administration's goals in this regard have in effect been achieved through the enactment of the Deepwater Port Act of 1974, 33 U.S.C. §§ 1501 *et seq.* The salient fact about that legislation, as it affects ARCO's claims, is that it reflects a general agreement that the environmental risks associated with the use of supertankers should be minimized by siting port facilities for them far

[78]The oil tankers to be subsidized, it should be noted, are only those used in U.S.-foreign trade. (A. 60, 61.)

[79]Supertanker construction, it must be emphasized, is only one part of the tanker construction program. Through the spring of 1976, two-thirds of the tankers whose construction had been or was being subsidized by the Maritime Administration had been smaller than 125,000 DWT. (A. 60.) Moreover, in light of the huge surplus capacity in the world tanker fleet, and the continuing cancellation of orders, it is open to question how many new, larger tankers will be ordered in the next five to ten years, regardless of any federal policies.



offshore, away from sensitive estuarine environments and crowded, existing ports and waterways, such as Puget Sound.[80] The environmental purpose of the legistration is well expressed by one of its sponsors, Senator Hollings:

> Deepwater ports are also considered preferable from an environmental point of view. Keeping oil-carrying vessels offshore lessens the possibility of collisions and grounding in crowded harbor areas where most oil spill mishaps occur. In addition, estuaries and coastal wetlands are the most sensitive to oil spill damage. Deepwater ports would remove oil vessel movements out to deeper water. The possibility of damage to coastal ecosystems from an oil spill from such a port is much reduced * * * * Overall, it has been concluded that offshore supertanker terminals offer the greatest environmental advantages of deep draft harbor design.

Statement of Senator Ernest Hollings, 120 Cong. Rec. 34625 (1974).

Chapter 125, far from being inconsistent with the Merchant Marine Act tanker construction program, supports and implements the general federal judgment that supertanker use should be confined to offshore terminals, where environmental risks can be minimized, and kept at a distance from sensitive estuaries such as Puget Sound.

[80]This was indeed the view of the Maritime Administration. *See* Statement of Clayton Cook, General Counsel of the Maritime Administration, *Joint Hearings on S.1751 and S.2232 Before the Special Joint Subcommittee on Deepwater Ports Legislation of the Senate Committees on Commerce, Interior and Insular Affairs and Public Works*, 93rd Cong., 1st Sess. 283, 284 (1973).

## III. CHAPTER 125 DOES NOT INTERFERE WITH INTERNATIONAL AGREEMENTS OR WITH FEDERAL POWERS TO MAKE TREATIES AND TO CONDUCT FOREIGN AFFAIRS.

Appellants have already discussed the contention that Chapter 125 interferes with the process of negotiating international marine pollution agreements. Chapter 125's provisions are simply unrelated to the kind of international agreement on standards of tanker design, construction or operation which the United States has sought or might seek. Accordingly, Chapter 125 has no impact on the treaty-making or treaty ratification process. *See* discussion on pages....., *supra*. Thus, it cannot be deemed inconsistent with the federal power to make treaties (Article II, Section 2, Clause 2 of the Constitution) and any implied power to conduct foreign affairs.[81]

[81]Even assuming that such an impact could be found, there is no case which holds that, independent of a statute or treaty, and in the absence of any undue burden on foreign commerce, state legislation designed to protect the health, safety and environment of state citizens may be held unconstitutional on the grounds that it interferes with federal power to make treaties and the implied federal powers to conduct foreign affairs. To the contrary, it has been held that state police power regulation may be proper even when it may have indirect effects on foreign affairs. *Alaska v. Bundrant*, 546 P.2d 530 (Alaska), *appeal dismissed sub nom. Uri v. Alaska*, 97 S. Ct. 40 (1976). *Zshernig v. Miller*, 389 U.S. 429 (1968), on which ARCO relied below, involved adjudication of property rights by a state probate court, based upon determinations of an explicit international or foreign affairs nature, *e.g.*, whether the representation of counsels, ambassadors or other representatives of foreign nations is credible or made in good faith, and is plainly inapposite here. Not only are no such foreign affairs determinations made by state authorities in the instant case, but it would be a remarkable and unprecedented extension of *Zshernig* to apply its holding to area in which states are exercising well-established powers to protect the health and safety of their



ARCO, however, made several additional foreign affairs-related arguments which, in essence, boil down to claims of conflict with treaty obligations:[82] (1) that Chapter 125 interferes with the rights of innocent passage of foreign flag vessels transiting Puget Sound; (2) that Chapter 125 interferes with certain bilateral boundary water treaties with Canada; and (3) that Chapter 125 interferes with multilateral instruments aimed at reducing marine pollution. The District Court reached none of these arguments. None is valid.

### A. Application Of Chapter 125 Has Not Violated The Right To Innocent Passage Of Foreign Flag Tankers.

Application of the requirements of Chapter 125 to foreign flag vessels in transit through Puget Sound has not violated the so-called right of "innocent passage" embodied in Article 14 of the Convention on the Territorial Sea and the Contiguous Zone [1964], 15 U.S.T. 1606, T.I.A.S. No. 5639 (the "Territorial Sea Convention"). Because there is no evidence that

citizens through regulation of vessels carrying hazardous cargoes—regulation long held lawful as to vessels of all registries. *See, e.g., The James Gray v. The John Fraser*, 62 U.S. (21 How.) 184, 187 (1858); *The Merrimac*, 81 U.S. (14 Wall.) 199, 203 (1871).

[82]Because a treaty is "the supreme Law of the Land" under Article VI, Clause 2, of the Constitution, *see, e.g., Foster v. Neilson*, 27 U.S. (2 Pet.) 253 (1829), conflicting state law cannot stand. While it is undisputed that no existing treaty, convention or agreement to which the U.S. is or may become a party contains any provision which by its terms would prohibit parties from prescribing additional, more stringent standards for vessels entering their jurisdiction (A. .....) ARCO nonetheless has maintained that Chapter 125 in effect obstructs the realization of their objectives. This argument, of course, simply involves application of general rules of preemption and has nothing to do with interference with foreign affairs powers as such.

there has been any traffic to British Columbia ports by tankers larger than 125,000 DWT (A. 66), and because it is hypothetical and speculative whether such traffic will ever occur, the only innocent passage issue ripe for determination at this time relates to the application of the pilotage and tug escort provisions of Chapter 125 to vessels between 40,000 and 125,000 DWT. *Cf., Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 336-37 (1973). As to such traffic, U.S. obligations to respect innocent passage are unaffected by Chapter 125.

*First*, to the extent that Puget Sound (or parts thereof) constitute "internal waters" of the Nation, as distinguished from the "territorial sea," the right of innocent passage just does not apply. Colombos, *The International Law of the Sea*, 87-88 (6th Ed. 1967); *see also United States v. Louisiana*, 394 U.S. 11, 22 (1969). The State of Washington legislature has generally defined "Puget Sound" only to mean "all the *inland waters* of the State of Washington inside the international boundary line between the State of Washington and British Columbia * * * *." Wash. Rev. Code § 88.16.050 (emphasis added.) The U.S. Government, moreover, has never indicated that any parts of Puget Sound, including Haro and Rosario Straits are other than "internal waters" of the United States, in which foreign ships do not have the right of innocent passage.

*Second*, even if the doctrine of innocent passage



were applicable, it is subject to reasonable regulatory requirements to protect the coastal state, such as those embodied in Chapter 125.[83]

The problem of innocent passage was fully considered during congressional deliberations on the PWSA itself. It was the conclusion of the Senate Commerce Committee that reasonable regulations designed to protect our national environment would not impede the right of innocent passage. The Senate Commerce Committee stated:

> [T]he right of innocent passage is not absolute and it is recognized under international law that foreign flag vessels may be obligated to comply with orders and maritime regulations which contribute to the safety of navigation or that are of a sanitary or police character. It seems clear that the regulations contemplated in H.R. 8140 are of this nature. PWSA Senate Report at 2793-94.

If regulations for the safety of navigation or of a sanitary or police character under the PWSA do not impede innocent passage, neither does application of the requirements of Chapter 125—a State statute intended to accomplish the same purpose.

### B. Chapter 125 Does Not Violate Boundary Water Treaties With Canada.

Various treaties and international agreements define the boundary line between the United States and Canada (A. 95.) Vessels bound for Vancouver from the Pacific Ocean do occasionally pass through

---

[83] *See generally* Colombos, *The International Law of the Sea* 88 (6th ed., 1967); O'Connell, II *International Law* 630 (1970).

U.S. waters in making this transit (A. 64), although it is possible to navigate to British Columbia ports without entering Washington State waters. Two treaties are claimed to have an effect on this traffic: (1) the Treaty with Great Britain in Regard to Limits Westward of the Rocky Mountains, 9 Stat. 869, signed June 15, 1846, entered into force July 17, 1846 (the "1846 Treaty"); and (2) the Treaty with Great Britain Relating to Boundary Waters Between the United States and Canada, 36 Stat. 2448, signed January 11, 1909, proclaimed May 13, 1910 (the "1910 Treaty"). Even if ripeness were not again a bar to adjudication, it is clear that neither treaty is violated by Chapter 125.

The 1846 Treaty provides, in Article I, that "the navigation of the whole of the said channel and straits * * * [shall] remain free and open to both parties [i.e., the United States and Great Britain]." However, the language "free and open" in the treaty has never been interpreted to mean completely unregulated. Local statutes of a regulatory nature have in fact for decades been applied without challenge to all vessels entering Washington State waters.[84]

The 1910 Treaty, for its part, does not apply to Puget Sound but rather to:

[84]*See, e.g.*, a prohibition against discharging ballast in waters of certain depths (Laws of Washington Territory 1860, p. 124); a prohibition against desertion of ships on Puget Sound and establishing a defense for the indictment (Laws of Washington Territory 1860, pp. 329 *et seq.*); establishment of a scheme for pilotage, for a pilotage commission, and for duties for pilots on the waters of Puget Sound, the Strait of Juan de Fuca, and adjacent straits (Laws of Washington Territory 1868, pp. 33 *et seq.*).



> The waters from main shore to main shore of the lakes and rivers and connecting waterways, or portions thereof * * * between the United States and * * * Canada.

These boundary waters have consistently been interpreted to mean "fresh" and not "salt" waters. Bloomfield and Fitzgerald, *Boundary Water Problems of Canada and the United States* 17 (1958).

### C. Chapter 125 Does Not Conflict With Any Multilateral Marine Pollution Treaty, Convention Or Agreement.

Trade in petroleum is worldwide in scope and there is much in the way of international regulation of oil transport. (A. 92-95.) But merely to state that there is a variety of international treaties, agreements and conventions, many of which are not in force, or have not even been ratified by the United States, is to prove little. The question is how do these international agreements, treaties and conventions affect the rights of the United States to regulate tanker pollution. The answer is, at least as far as the three major conventions of even arguable relevance to this case are concerned: not at all.[85]

[85]Certain multilateral agreements plainly have nothing to do with the issues here. The International Convention for Civil Liability for Oil Pollution Damage, [1969], and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, [1971], neither of which has been ratified by the United States, relate solely to liability and compensation for pollution damage. The International Convention Relating to Intervention on the High Seas in the Cases of Oil Pollution Casualties, [1969], 26 U.S.T. 765, T.I.A.S. No. 8068, together with its 1973 Protocol, deals solely with actions a nation may take on the high seas after an oil spill has occurred. The International Convention on Load Lines, [1966], 18 U.S.T. 1857, T.I.A.S. No. 6331, simply establishes the maximum draft by which a ship

### 1. The International Convention for the Prevention of Pollution of the Sea by Oil, 1954.

The International Convention for the Prevention of Pollution of the Sea by Oil, [1954], 12 U.S.T. 2989, T.I.A.S. No. 4900, as amended, 17 U.S.T. 1523, T.I.A.S. No. 6109 (the "1954 Oil Pollution Convention"), is today the only international agreement in force, the primary purpose of which is to regulate tanker-generated pollution. But what is significant about the Convention is that it fully reserves the rights of Contracting Parties to take whatever action they deem appropriate within their jurisdiction. Article XI of the Convention states:

> Nothing in the present Convention shall be construed as derogating from the powers of any contracting government to take measures within its jurisdiction in respect to any matter to which the Convention relates * * * *.

The Senate Report on the Convention is instructive. In recommending its approval, the Senate Foreign Relations Committee suggested the following "Reservation":

> In accepting the Convention the United States declares that it does so subject to the understanding that Article XI effectively reserves to the parties to the Convention freedom of legislative action in territorial waters, including the application of existing laws, anything in the Convention which may appear to be contrary

can be loaded and does not relate directly to protection of the marine environment. The International Regulations for Preventing Collisions at Sea, [1960], 16 U.S.T. 794, T.I.A.S. No. 5813, revised 1972, establish certain vessel procedures to reduce the likelihood of collision, but are unrelated to and unaffected by the provisions of Chapter 125.



> notwithstanding. Specifically, it is understood that offenses in U.S. territorial waters will continue to be punishable under U.S. laws regardless of the ships' registry. S. Rep. No. 666, 87th Cong., 1st Sess. (1961).

This "Reservation" established the fundamental principle, to which the United States has never ceased to adhere, that international treaties to which the United States is a party should not restrain our flexibility to establish local rules and regulations, as appropriate, to protect our national environment. Necessarily, the Convention in no way reflects upon the allocation of power between the federal and state governments to take the lead in setting such standards. Indeed, in the face of a claim that the Maine Coastal Conveyance Act interfered with the conduct of foreign affairs and conflicted with international treaties, particularly the 1954 Oil Pollution Convention, the Supreme Judicial Court of the State of Maine specifically held that because Article XI of such Convention makes plain an intent not to affect rules governing the territorial sea, a state's power to regulate is not affected thereby. *Portland Pipe Line Corp. v. Environmental Improvement Commission*, 307 A.2d 1, 46-47 (Me.), *appeal dismissed*, 414 U.S. 1035 (1973).

### 2. The International Convention for the Safety of Life at Sea, 1960.

ARCO attached great importance in its brief before the District Court to the International Convention for the Safety of Life at Sea, [1960], 16

U.S.T. 185, T.I.A.S. No. 5780 ("SOLAS"), which is in force and to which the United States is a party. While it does contain provisions specifying design, equipment and inspection requirements for oil tankers, among other vessels, SOLAS is a treaty primarily designed to ensure the safety of human life on all types of vessels. By its terms, certificates of compliance only must be accepted for the purpose of ensuring "safety of life." SOLAS, Article I(b). The Senate Commerce Committee, during its consideration of the PWSA, soundly rejected the contention that unilateral imposition of U.S. environmental standards on vessels entering U.S. navigable waters might be inconsistent with SOLAS, stating:

> [J]ustifiable concerns were expressed about the unilateral application by the United States of standards on vessels of foreign registry. Initially, there was even concern that this might constitute violation of our obligations under international treaty.
> The primary treaty in this regard is the Safety of Life at Sea Concentiol (SOLAS). However, that Convention relates to *safety* rather than protection of the marine environment. And its regulations relating to construction are directed primarily to passenger vessels, which would not be covered by H.R. 8140. Regulations applying to other vessels under SOLAS are largely procedural in nature rather than setting forth construction standards.

PWSA Senate Report at 2782-83.

If application of design and construction requirements to vessels under the PWSA does not violate SOLAS, by the same reasoning, neither would application of any provisions of Chapter 125, which are substantially less restrictive than actual design and construction requirements.[86]



### 3. The International Convention for the Prevention of Pollution from Ships, 1973.

The International Convention for the Prevention of Pollution from Ships, [1973], opened for signature in November 1973 (the "1973 Marine Pollution Convention"), is the most detailed convention negotiated to date concerned with the direct regulation of vessel source pollution. The 1973 Marine Pollution Convention has not yet entered into force, nor has it yet been ratified by the United States. But, in any case, it is clear that it, like the 1954 Oil Pollution Convention, in no way restricts the U.S. right to impose additional more stringent standards for tankers which enter U.S. territorial waters. As Russell Train, Chief Negotiator of the 1973 Marine Pollution Convention, stated during hearings held November 14, 1973, before the Senate Commerce Committee:

> "The Convention in no way restricts the rights of states to set more stringent standards within their jurisdiction." *See generally Hearings on the 1973 IMCO Conference on Marine Pollution*

---

[86]Obviously, the State of Washington's exclusion of supertankers from Puget Sound is also consistent with the type of action which might be taken under the PWSA. Section 201(13) of Title II of the PWSA provides:

> "The Secretary may, subject to recognized principles of international law, deny entry into the navigable waters of the United States to any vessel not in compliance with the provisions of this section or the regulations promulgated thereunder."

And the right to exclude vessels from entry is well recognized under international law. *See* Whiteman, *Digest of International Law*, 186-88, 216-17, 250-51 (1965).

*From Ships Before the Senate Committee on Commerce*, 93d Cong., 1st Sess. 2-13, ser. 93-52 (November 14, 1973).

Thus, the latest convention, as with the previous conventions, continues the understanding that U.S. international obligations shall not derogate from United States' prerogatives to seek to eliminate the risk of pollution from foreign flag vessels entering U.S. navigable waters.

## IV. CHAPTER 125 IS A VALID EXERCISE OF THE STATE POLICE POWER UNDER THE COMMERCE CLAUSE.

ARCO claimed below that Chapter 125 interfered with a need for national uniformity and unduly burdened interstate and foreign commerce, and thus was invalid under the Commerce Clause (Article I, Section 8, Clause 3).[87] The District Court found it unnecessary to reach this contention because it held the statute preempted.

Should the Court decide that Chapter 125 has not been preempted, the Commerce Clause question also should be decided for at least two reasons: one, the factual record is complete; and two, since there is a history of full compliance by ARCO with Chapter 125 since September 8, 1975, it is possible to determine clearly what interference, if any, the statute has on interstate commerce.

[87]At the outset, it must be noted, as in the preemption field, state police power statutes "carry a strong presumption of validity when challenged in court." *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 524 (1959). There is, as noted above, no claim that Chapter 125 is an invalid exercise of the state police power.



As with preemption, the resolution of claims that the Commerce Clause has been violated "* * * turns on the unique characteristics of the statute at issue and the particular circumstances in each case." *Boston Stock Exchange v. State Tax Commission*, ..... U.S. ....., 97 S. Ct. 599 (1977). The "unique characteristics" of Chapter 125 and the "particular circumstances" of this case demonstrate that Chapter 125 does not in any way impermissibly infringe on interstate commerce.[88]

### A. The Subject Matter Regulated Does Not Require A Uniform National Rule.

Chapter 125 is designed to reduce the risk of pollution of the inland waters of the State of Washington. The Court has long recognized the importance of local control over the waters of a state for purposes of protecting environmental values and consequently has never deemed such regulation a subject requiring national uniformity.

The Court has uniformly found that a subject is suited to local regulation where it touches on health and safety or environmental protection. *See, e.g., California v. Zook*, 336 U.S. 725 (1949); *Colorado Anti-Discrimination Commission v. Continental Air Lines, Inc.*, 372 U.S. 714 (1963); *Terminal Railroad Association v. Brotherhood of Railroad*

[88]ARCO cannot argue that Chapter 125 discriminates against interstate commerce in favor of local interests. Two-thirds of all oil imported into Washington State is consumed by its residents who, therefore, pay the increased costs caused by the enactment of Chapter 125. (A. 48-49.). *See Milk Control Board v. Eisenberg Farm Products*, 306 U.S. 346 (1939).

*Trainmen*, 318 U.S. 1 (1943). The Court has also consistently upheld state statutes designed to protect a state's natural resources. *Cities Service Gas Co. v. Peerless Oil & Gas Co.*, 340 U.S. 179 (1950); *Geer v. Connecticut*, 161 U.S. 519 (1896); *Hudson County Water Co. v. McCarter*, 209 U.S. 349 (1908); *Manchester v. Massachusetts*, 139 U.S. 240 (1891); and *Skiriotes v. Florida*, 313 U.S. 69 (1941). The different needs and peculiar features of varied port areas, as noted above, have long been held to negate any purported claims for national uniformity.[89] See pp. 26, 27. We are aware of no case that held that national uniformity is required in the field of regulation of pollution from tankers. As the Court stated in *Clyde Mallory Lines v. Alabama*, 296 U.S. 261, 267 (1935):

> State regulations of harbor traffic, although they incidentally affect commerce, interstate or foreign, are of local concern. So long as they do not impede the free flow of commerce and are not made the subject of regulation by Congress they are not forbidden.

[89]Congress itself has recognized the importance of local regulation of inland marine pollution. See, for example, the Federal Water Pollution Control Amendments of 1972, 33 U.S.C. §1251(b); the Coastal Zone Management Act of 1972, 16 U.S.C. § 1451 *et seq.*; the Deepwater Port Act of 1974, 33 U.S.C. §§ 1501 *et seq.*

With respect to operational requirements for oil tankers, the Ports and Waterways Safety Act itself, as well as Coast Guard implementation thereof, recognizes that a diversity of local conditions may call for a diversity of appropriate solutions. Both the Senate and House Reports on the legislation emphasize the port by port approach mandated by the Act, taking into account varying local environmental hazards. PWSA Senate Report at 2791-2792; PWSA House Report at 8. And even the Coast Guard's general regulatory proposals, see 39 *Fed. Reg.* 24157 (June 28, 1974) (Exhibit S), 41 *Fed. Reg.* 18766 (May 6, 1976), recognize that operating requirements may differ as a function of particular navigational hazards.



The fact that Chapter 125 regulates instrumentalities in interstate commerce does not make the case for local control any less compelling. State regulation of vehicles engaged in interstate commerce has regularly been sustained. This includes regulation of trucks, *South Carolina Highway Department v. Barnwell Brothers, Inc.*, 303 U.S. 177 (1938); vessels, *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960); railroads, *Erb v. Morasch*, 177 U.S. 584 (1900), and *Chicago, R.I. & P.R.R. Co. v. Arkansas*, 219 U.S. 453 (1911); and barges, *Gilman v. Philadelphia*, 70 U.S. (3 Wall.) 713 (1865).

The Commerce Clause is not a sanction for a large national corporation to prevent the State of Washington from protecting a significant natural resource, under the guise of a claim of need for national uniformity. The contention that Chapter 125 imposes impermissibly on a national oil transportation system, or for that matter, on national vessel traffic, is conveniently to ignore the provisions of the Washington statutory scheme.

First, the tug escort, alternative design and pilotage provisions have no impact on any national transportation system, if one exists. Indeed, most ports have differing pilotage and tug requirements, and the alternative design provisions do not prevent the entry of any tanker into Puget Sound.

Second, as to the supertanker access limitation of Chapter 125, the State of Washington does not exclude supertankers from all its waters or limit the importation of oil. Chapter 125 permits supertank-

ers to off-load west of the access limit line, where the maneuvering room is greater and where there would be less damage to state resources from an oil disaster.

Beyond that, the State of Washington has a right to exclude supertankers from Puget Sound. This can be demonstrated in several ways. First, as the discussion above concerning the Deep Water Port Act of 1974 and the Coastal Zone Management Act of 1972 demonstrates, Congress has provided the states with an absolute veto over the presence of supertankers in nearby waters, even those beyond the states' boundaries.

Moreover, there is no requirement for uniform action with regard to vessel size limitations. Vessel size limitations will vary as a function of controlling depth and other factors, quite apart from state or local regulatory action in a field where lack of uniformity has been the rule.

Finally, there is no case that denies this power to the State. *Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761 (1945), the primary case upon which ARCO relied below to support its uniformity contention, does not support the claim of uniformity in pollution regulation cases. The Court itself in that decision stated, in distinguishing *South Carolina Highway Department v. Barnwell Bros., Inc.*, 303 U.S. 177 (1938), a case that upheld the right of a state to regulate the size of trucks passing in interstate commerce:

> [R]egulations of the use of the highways are akin to local regulation of rivers, harbors, piers and docks, quarantine regulations, and game laws, which, Congress not acting, have been sustained even though they materially interfere with interstate commerce.
> (Citations omitted.)

303 U.S. at 187-88.[90]



The instant case is not one involving an interstate common carrier which must repeatedly separate and reconstitute its vehicles as they pass from state to state, *Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761 (1945), or which cannot use the same vehicle in other states without performing burdensome modifications to it, *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959). There is no evidence before the Court that the supertanker access limitation has disrupted ARCO's shipping activity or unconstitutionally burdened it, but only evidence that ARCO may have been forced to behave in a way it may have preferred not to.

Simply put, there never has been nor is there presently, any need for nationally uniform regulation of tug escorts or vessel size limitations on navigable waters under the terms of the Commerce Clause.

### B. Chapter 125 Does Not Unconstitutionally Burden Interstate Commerce.

[90]The other case relied on by Atlantic Richfield and Seatrain for their uniformity claims, *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959), was decided on the ground that the burden of the state regulation outweighed its dubious benefit, 359 U.S. at 530, and has little relevance to any purported need for national uniformity. Obviously, the optional design provisions cannot impinge on or burden any commerce because they are not required by Chapter 125.

When considering the validity of a state regulation under the Commerce Clause, the Court has sometimes weighed the burden upon interstate commerce against the interests which the regulation is designed to promote. However, this is not a proper case in which to weigh the value of the benefits of Chapter 125 to the citizens of the State against the costs to the oil companies, since the public value and the industry's economic burdens are noncomparable. In *Brotherhood of Locomotive Firemen & Enginemen v. Chicago, R.I. & P.R.R. Co.*, 393 U.S. 129, 138-39, 140 (1968), the Court said:

> This summary, taken from evidence heavily relied upon by the railroads and generally favorable to their position, leaves little room for doubt that the question of safety in the circumstances of this case is essentially a matter of public policy, and public policy can, under our constitutional system, be fixed only by the people acting through their elected representatives.
>
> * * *
>
> It is difficult at best to say that financial losses should be balanced against the loss of lives and limbs of workers and people using the highways. We certainly cannot do so on this showing.

Other courts have rejected also the balancing approach. *See Construction Industry Association v. Petaluma*, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976); and *American Can Co. v. Oregon Liquor Control Commission*, 15 Ore. App. 618, 517 P.2d 691 (1973), *review denied, Id.*, (Ore. 1974), which relied on *Brotherhood of Locomotive Firemen*



*& Enginemen v. Chicago, R.I. & P.R.R., supra.*[91]

Chapter 125 does no more than permit Washington State to exercise its traditional police powers to protect for its citizens and the citizens of the country the enormous economic and environmental resources of Puget Sound. No claim is made by any party that the interests protected by Chapter 125 are insubstantial, and any attempt to balance its intangible benefits and alleged burdens is but an effort to second-guess a legislative determination that Chapter 125 is a reasonable response to the perilous possibility of insidious oil spills.

If, nevertheless, a balancing approach is to be applied here, it is essential to bear in mind on whose shoulders the burden of proof falls. Since Chapter 125 is entitled to a presumption of constitutionality, it is ARCO's responsibility to prove both the magnitude of the burdens and the statute's ineffectiveness as one solution to the problems of oil pollution from tankers. The burden is on ARCO to produce evidence, not to go forward with mere rhetoric. The State need not prove that the means chosen to achieve the legitimate local purposes are in all respects effective. As noted by the Court in *Brotherhood of Locomotive Firemen & Enginemen v. Chicago, R.I. & P.R.R. Co.*, 393 U.S. 129, 138-39 (1968):

> The District Court's responsibility for making "findings of fact" certainly does not authorize it to resolve conflicts in the evidence against the

[91] Cases that have used a balancing approach, such as *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366 (1976), are cases involving competing economic interests and are not applicable here.

> legislature's conclusion or even to reject the legislative judgment on the basis that without convincing statistics in the record to support it, the legislative viewpoint constitutes nothing more than what the District Court in this case said was "pure speculation."

ARCO utterly failed below to carry its burden. With regard to the effectiveness of Chapter 125 as a means to protect the ecology and economy of Puget Sound from the devastation of major oil spills, the view of the evidence most favorable to ARCO shows at the very most that there is room for good faith dispute. (A. 84.) Moreover, the record plainly demonstrates that the burden of Chapter 125 is miniscule, problematic and speculative. This is indicated by examining the facts.

First, ARCO and the five other refineries on Puget Sound have complied with Chapter 125 since it became effective. (A. 44.) To the present time there has been no reduction in the amount of oil processed at the Puget Sound refineries as a result of Chapter 125, and the six oil companies operating refineries in Puget Sound at present adequately supply their refineries using tankers of less than 125,000 DWT. (A. 68.) The only refinery on Puget Sound affected by the 125,000 limitation is ARCO's refinery at Cherry Point and the effect on that refinery is minimal.

ARCO itself owns or operates 14 tankers, none of which is over 120,000 DWT and four of which are under the 40,000 DWT limitation. (A. 52-53.) Cherry Point received only six vessels



greater than 125,000 DWT in the four years preceding the enactment of Chapter 125, the largest of which was 138,000 DWT. (A. 113.) Cherry Point was designed and built to refine Alaska oil. That oil is expected to begin to flow in 1977, and ARCO plans to ship its share to Cherry Point, which will amount to 100% of that refinery's capacity.[92] (A. 49.) Thus there will be little or no foreign trade at all and few, if any, foreign supertankers will deliver oil to the only facility in Puget Sound capable of receiving supertankers. The fact that there may be a large or small number of foreign flag supertankers that could theoretically call at Cherry Point is hopelessly irrelevant to this case. As a practical matter the only arguable effect of the supertanker limitation, therefore, may be on ARCO's ability to use two 150,000 DWT supertankers it is building (A. 53) and one or two other U.S. flag supertankers eligible for the coastwise trade, although there is nothing in the record to indicate that it could charter these vessels owned by others.[93]

Second, the burden of the tug escort requirement of Chapter 125 is miniscule—$.0087 per barrel for a tanker of 120,000 DWT (A. 68), not even a penny a barrel. Likewise, there is a very minor increase in cost that occurs in operating a 120,000

[92]It is important to realize that a single delivery from one of the 120,000 DWT tankers supplies Cherry Point's daily capacity nine times over.

[93]In the overall economics of bringing oil from the ground to the consumer "* * * the cost of sea transportation is one of the least expensive elements." PWSA Senate Report at 2767.

DWT as opposed to a 138,000 DWT tanker, the largest ship that has ever docked at Cherry Point. The exact amount of the difference is not spelled out in the record. Even if ARCO intended to use its uncompleted 150,000 DWT ships on the Valdez-Cherry Point run, the cost difference is estimated to be approximately $.04 a barrel.[94] (A. 64.) These costs are trivial when compared to the current world well head price of over $12 per barrel. Of equal importance, as the Supreme Court noted in *Brotherhood of Locomotive Firemen & Enginemen v. Chicago, R.I. & P.R.R. Co.*, 393 U.S. 129, 140 (1968), costs alone are never grounds for invalidating a state statute:

> It is difficult at best to say that financial losses should be balanced against the loss of lives and limbs of workers and people using the highways.

Accord; *American Apparel Manufacturers Association v. Sargent*, 384 F. Supp. 289 (D. Mass. 1974); *Procter & Gamble Co. v. Chicago*, 509 F.2d 69 (7th Cir.), *cert. denied*, 421 U.S. 978 (1975).

Another cost factor to be considered is that of cleaning up a massive oil spill in the confined waters of Puget Sound. The largest oil spill that has occurred to date in the Sound was 20,000 gallons, or approximately 476 barrels. The clean-up cost exceeded $50,000 (A. 84). This amount of oil is about 66 tons—an infinitesimal amount compared to the 26,000 tons lost by the *Argo Merchant* off the

[94]While Seatrain argued that Chapter 125 impeded its ability to sell its supertankers, there is nothing in the record to support that contention.



coast of Massachusetts last winter. The costs of cleaning up an oil spill of the size of the *Argo Merchant*, assuming a very conservative $2 a gallon, a lower cost of any spill in Puget Sound to date, would be approximately $15 million.[95] It is conceded here that it is not known whether oil spills of 20,000 gallons and greater in Puget Sound could be cleaned up under existing capabilities without significant damage to public and private property first taking place. (A. 84). It is appropriate to spend a few pennies a barrel to lower the risk of costly oil spills and oil pollution damages. Even assuming that a process of weighing benefits against burdens on interstate commerce is considered appropriate, the state benefit created by Chapter 125 is significantly higher than any demonstrated effect on interstate commerce.

Arrayed against these almost negligible costs are the enormous benefits resulting from decreasing the risk and number of oil spills. Puget Sound is priceless and more than worthy of protection—a glacially formed estuary whose physical characteristics are unique in the "lower 48" states (A. 68, 69); whose waters lap islands, marshes, tidal flats, bays and inlets (A. 68, 69); where clean and productive waters support a fishery resource valued at $170 million a year (A. 69-70, 71); whose beds and tidelands are valued in excess of $2 billion (A. 73); where more than $125 million annually is spent on recreational

[95]This approximately would equal the cost to ARCO of 55 years of compliance with the tug escort provisions.

boating (A. 73); where 65% of the State's people choose to make their homes (A. 73); where many species of birds and marine mammals feed and flourish (A. 72); where fish and wildlife preserves and refuges, and over 150 public parks, are located (A. 74); where ferries carry passengers on 11 major and picturesque routes (A. 74); and where significant scientific research and educational programs are conducted (A. 74-75). The benefit from reducing the risk and potential size of an oil spill in this precious place—a benefit that the Washington Legislature is empowered and obliged to promote—is simply enormous.

## V. THE ELEVENTH AMENDMENT PRECLUDES JURISDICTION OF THE DISTRICT COURT OVER THE STATE OF WASHINGTON APPELLANTS.

State of Washington appellants Dixy Lee Ray, et al., contended below, and contend here, that (1) the real party defendant in the action below was the State of Washington, (2) the Eleventh Amendment therefore barred the District Court from hearing ARCO's suit, and (3) the line of cases interpreted as giving jurisdiction to federal courts to hear the type of action brought by ARCO should not be applied to this case.

The Eleventh Amendment has been stretched by the Court in two directions: to cover cases not comprehended literally by its language;[96] and not to cover

[96] *See, e.g., Employees v. Department of Public Health & Welfare*, 411 U.S. 279, 323 (1973) (Brennan, J., dissenting); *Parden v. Terminal Railway Co.*, 377 U.S. 184, 186 (1964). It has been held that, although the express language of the Amendment does not bar such suits, the Amendment confers on an unconsenting state immunity from suit in federal courts by one of its own citizens. *Hans v. Louisiana*, 134 U.S. 1 (1890).



cases where its language should afford relief to a state.[97]

The Eleventh Amendment clearly provides specific, rather than general, immunity for states from suits in federal court. Under its terms states are not immune from suits brought by citizens of another state, but only from such suits brought in federal court. The Amendment's purpose was, and its effect is, jurisdictional.[97a]

ARCO's cause of action was one that could and should have been brought in state court. The State of Washington, through its Uniform Declaratory Judgments Act, ch. 7.24, Wash. Rev. Code, provides the means. The Act provides, in part, as follows:

> A person * * * whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, stat-

[97] Fictions have been employed in the process. The result is that:

> Nobody knows anymore what to make of the Eleventh Amendment, and surely litigants and Courts are hampered by the abrupt wrinkles in the Eleventh Amendment fabric.
>
> Comparatively little has been written on the Eleventh Amendment, but what has appeared in the literature through the years show how incomprehensible the Eleventh Amendment doctrine has become.

Cullison, *Interpretation of the Eleventh Amendment (A Case of the White Knight's Green Whiskers)*, 5 Hous. L. Rev. 1, 24 (1967) (emphasis supplied).

[97a] It is clear that this suit, even though it does not seek to impose a financial liability on the State treasury, is as much a suit against the State as one in which the State is the named party. No one seriously believes otherwise.

> ute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder. Wash. Rev. Code § 7.24.020.

The elements requisite for the application of the Declaratory Judgments Act are present in this controversy. *See, Acme Finance Co. v. Huse*, 192 Wash. 96, 107, 73 P.2d 341, 345 (1937).[98]

ARCO's opposition below relied upon *Ex parte Young*, 209 U.S. 123 (1908), which held that the Eleventh Amendment does not bar a federal court from entertaining a suit against a state attorney general seeking to enjoin enforcement against railroads of statutes and orders asserted to violate the Fourteenth Amendment. This decision has been described as a "watershed case which sanctioned the use of the Fourteenth Amendment to the United States Constitution as a sword as well as a shield against unconstitutional conduct of state officers * * *" *Juidice v. Vail*, 97 S. Ct. 1211, 1217 (1977).

The holding of *Ex parte Young* is dependent on the underlying facts of the case.[99]

[98]Rights under the Federal Constitution are cognizable under the Act, as well as rights under the State Constitution. *See, e.g., Nostrand v. Little*, 58 Wn.2d 111, 116-117, 361 P.2d 551 (1961), *appeal dismissed*, 368 U.S. 436 (1962); *Huntamer v. Coe*, 40 Wn. 2d 767, 289 P.2d 489 (1952). *Cf.*, Peck, "*Standing Requirements for Obtaining Judicial Review of Governmental Action in Washington*," 35 Wash. L. Rev. 362, 387-392 (1960).

[99]In 1907, the Minnesota Legislature enacted a statute which reduced allowable railroad passenger rates by 33 percent. In the same year, the Minnesota Railroad and Warehouse Commission ordered railroad freight rate reductions of from 20 to 25 percent. Because noncompliance with the passenger rate act was made a felony, the constitutionality of its provisions could be challenged in a state court proceeding only by violating the statute and thereby suffering the risk of imposition of a fine of up to $5,000 or of a jail term of five years, or of both. Moreover, it was the trial court's opinion that, if they went unchallenged, the various rate reductions would cause a decline in passenger income of at least 22-23 percent and in freight income of at least 20-25 percent to affected railroad companies. *See Perkins v. Northern Pacific Ry. Co.*, 155 Fed. 445, 449-456 (D. Minn. 1907).



The Court's conviction that the railroads were effectively blocked from trying the constitutionality of the act in state court led to its decision:

> It may therefore be said that when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights. *Ex parte Young*, 209 U.S. 123, 147 (1908).[100]

The situation here is obviously different.

The holding of *Ex parte Young* has been criticized ever since it was rendered.[101]

The first Justice Harlan correctly argued in his dissent against the basis of the *Ex parte Young* decision:

> [T]he suit * * * was, as to the defendant Young, one against him *as, and only because he was*, Attorney General of Minnesota. No relief was sought against him individually but only in his capacity *as* Attorney General. And the manifest, indeed the avowed and admitted, ob-

[100]The Court also stated that:

> [t]o await proceedings against the company in a state court grounded upon a disobedience of the act, and then, if necessary, obtain a review in this court by writ of error to the highest state court, *would place the company in peril of large loss and its agents in great risk of fines and imprisonment* if it should be finally determined that the act was valid. *Id.* at 165 (emphasis supplied).

[101]"A 'storm of controversy' raged in the wake of *Ex parte Young* * * *" *Steffel* v. *Thompson*, 415 U.S. 452, 465 (1973).

> ject of seeking such relief was *to tie the hands* of the *State*, so that it could not in any manner or by any mode of proceeding, *in its own courts*, test the validity of the statutes and orders in question. It would therefore seem clear that within the true meaning of the Eleventh Amendment the suit brought in the Federal court was one, in legal effect, against the State * * * 209 U.S. at 173-174.[102]

Because the decision in *Ex parte Young* is inherently faulty, the Court should overrule it, insofar as that may be necessary to apply the prohibition of the Eleventh Amendment to parties situated as those in this case. Alternatively, the Court should restate the rule of *Ex parte Young* so as to give effect to its purpose, while at the same time insuring that the Eleventh Amendment affords protection to a state situated as is Washington here.[103]

The decision in *Ex parte Young* was based on three factors: (1) an asserted violation by the defendant of rights guaranteed by the Fourteenth Amendment, (2) a potential prosecution for violation of the challenged law that was both publicly threatened and acknowledged to be imminent, and

[102]The decision has been criticized ever since for "false pretense," Davis, *Suing the Government by Falsely Pretending to Sue an Officer*, 29 U. Chi. L. Rev. 435, 437 (1962), and for "its own illogic," Wright, *Federal Courts* at 159 (1963). One scholar has concluded:

> The decision in *Ex parte Young* rests on purest fiction. It is illogical. It is only doubtfully in accord with the prior decisions. Wright, *Federal Courts* at 160.

*See* also Cullison, *Interpretation of the Eleventh Amendment (A Case of the White Knight's Green Whiskers)*, 5 Hous. L. Rev. 1, 28 (1967).

[103]As Justice Brandeis stated:

> [I]n cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406-407 (1932) (dissenting opinion) (footnote omitted).



(3) a certainty that the plaintiffs would suffer irreparable injury if the regulations were to be enforced and they were to challenge their constitutionality after enforcement. None of these are present here.[104]

In this case, compliance with the State statute would cause neither "irreparable" nor "both great and immediate" loss to ARCO during the period the statute's constitutionality would be challenged in State court. Nor would ARCO suffer irreparable loss by seeking relief in Washington State courts by bringing an action under the Uniform Declaratory Judgments Act, a course of action not open to the railroad companies in *Ex parte Young*.

*Ex parte Young*, as the Court recently explained, "permitted suits against state officials to obtain prospective relief against violations of the Fourteenth Amendment." *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).[105]

[104]Nowhere is there evidence that State criminal prosecution of ARCO either has been threatened or is imminent. Indeed, Appellees have stipulated that they have been able to conform to the State statute. (A. 44.)

Nor is there here the "irreparable loss" or "irreparable damages" that must be present for a federal court to enjoin state officials from bringing criminal charges under a statute of questioned constitutionality. *See Younger v. Harris*, 401 U.S. 37, 43 (1970); *Fenner v. Boykin*, 271 U.S. 240, 243-44 (1926). *Cf., Mitchum v. Foster*, 407 U.S. 225, 242 (1972); *Pearl Assurance Co., Ltd. v. Harrington*, 38 F. Supp. 411, 414 (D. Mass. 1941) (decision by Frankfurter, J.), citing favorably the rule declared by Holmes, J., in *Massachusetts State Grange v. Benton*, 272 U.S. 525, 527 (1926); Jacobs, *The Eleventh Amendment and Sovereign Immunity*, 146 (1972).

[105]The Court has said that:

> This holding has permitted the Civil War Amendments to the Constitution to serve as a sword rather than merely as a shield, for those whom they were designed to protect. *Edelman v. Jordan*, 415 U.S. 651, 664 (1974).

*See also* Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies about Federalism*, 89 Harv. L. Rev. 682, n. 26 at 687 (1976).

The doctrine of *Ex parte Young* could continue under such a view to afford protection to those persons whose Fourteenth Amendment rights are being violated by state action, even if the Court were to accept Washington's argument here.

There is a need for the Court to deal with a line of decisions that are "unpredictable and * * * enmeshed in legal casuistry." Jacobs, *The Eleventh Amendment and Sovereign Immunity*, 155 (1972). A proper reformulation of *Ex parte Young* (or if necessary, an overruling of that case) and a reaffirmation of the Eleventh Amendment in cases such as this will mean clearer future standards and fewer dubious tests and distinctions.[106]

In summary, the State contends that it is protected here by the Eleventh Amendment; that the rule of *Ex parte Young*, to the extent that it denies that protection, should be overruled; and that, if not overruled, the rule of *Ex parte Young* should be properly defined and understood so as not to deny that protection. ARCO never argued that Chapter 125 violates any right guaranteed it by the Fourteenth Amendment (or by any other of the Civil War Amendments). The reason that the State here is protected by the Eleventh Amendment is that ARCO is not protected by the holding of *Ex parte Young*.

[106]One proposal that would remove the Court from a difficult position, give full effect to both the Amendment and the doctrine, and provide for fewer interpretive problems in the future is a recognition by the Court that the Fourteenth Amendment impliedly supplanted the Eleventh Amendment to the extent necessary to give citizens recourse against states in federal court actions seeking to vindicate Fourteenth Amendment rights.



## CONCLUSION

Based on the foregoing, Chapter 125 constitutes a valid exercise of the State of Washington's police powers to protect its highly valued inland marine waters. Neither the Ports and Waterways Safety Act nor any other federal statutory or federal constitutional provision precludes implementation of Chapter 125. Therefore the decision of the District Court should be reversed.

Furthermore, based on the jurisdictional limitations of federal courts contained in the Eleventh Amendment, the appellant State of Washington public officials, contrary to the ruling of the District Court, should be dismissed from this proceeding.

Respectfully submitted,

SLADE GORTON,
*Attorney General, State of Washington*

May, 1977

CHARLES B. ROE, JR.
*Senior Assistant Attorney General*

ROBERT E. MACK,
RICHARD L. KIRKBY,
*Assistant Attorneys General*

DAVID E. ENGDAHL,
*Special Assistant Attorney General*

Temple of Justice
Olympia, Washington 98504
(206) 753-2354

Attorneys for Appellants
Dixy Lee Ray, Slade Gorton,
John C. Hewitt, Harry A. Greenwood,
Benjamin W. Joyce, Philip H. Luther,
and J. Q. Paull

CHRISTOPHER T. BAYLEY,
*King County Prosecuting Attorney*

THOMAS A. GOELTZ,
ROBERT D. JOHNS,
JOHN E. KEEGAN,
*Deputy Prosecuting Attorneys*

King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 344-7398

Attorneys for Appellant
Christopher T. Bayley

DAVID S. MCEACHRAN,
*Whatcom County Prosecuting Attorney*

311 Grant Avenue
Bellingham, Washington 98225
(206) 676-6784

Attorney for Appellant
David S. McEachran

ELDON V. C. GREENBERG,
RICHARD A. FRANK,
Center for Law and Social Policy
1751 N Street, N.W.
Washington, D.C. 20036
(202) 872-0670

THOMAS H. S. BRUCKER,
Durning, Smith & Brucker
1411 Fourth Avenue
Seattle, Washington 98101
(206) 624-8901

Attorneys for Appellants
Coalition Against Oil Pollution,
National Wildlife Federation,
Sierra Club, and Environmental
Defense Fund, Inc.

VANCOUVER ISLAND

BRITISH COLUMBIA

WHATCOM

BELLINGHAM

SAN JUAN

ISLAND

SNOHOMISH

EVERETT

KITSAP

SEATTLE

MASON

TACOMA

GRAYS HARBOR

THURSTON

PACIFIC

WAHKIAKUM

COWLITZ

CLARK

VANCOUVER

OREGON

# STATE OF WASHINGTON

Scale 1:500,000

UNITED STATES
DEPARTMENT OF THE INTERIOR
GEOLOGICAL SURVEY

Datum is mean sea level

SOURCE DATA

POPULATION KEY

SEATTLE — more than 100,000
YAKIMA — 25,000 to 100,000
Olympia — 1,000 to 25,000
Ritzville — 1,000 to 5,000
Concrete — less than 1,000

LEGEND:

SHADED RELIEF

FOR SALE BY U S GEOLOGICAL SURVEY DENVER COLORADO 80225 OR WASHINGTON D C 20242

COMPILED IN 1961
EDITION OF 1964